WE ARE
FATHERS4JUSTICE™

THE OFFICIAL F4J HANDBOOK

PRODUCED BY NICK LANGFORD ON BEHALF OF FATHERS 4 JUSTICE

"An exhaustive, informative and indispensable guide for fathers, mothers and non-resident parents everywhere. This book could be invaluable in determining what sort of future you and your children will have if the Family Courts and the CSA become involved."

MATT O'CONNOR, FOUNDER, FATHERS4JUSTICE

WE ARE FAMILY
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THE FATHERS4JUSTICE HANDBOOK

Nick Langford

Published in Great Britain in October 2011

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FOREWORD by Matt O'Connor

Fathers 4 Justice Research Director Nick Langford's Fathers 4 Justice E-Handbook 2011 Edition, is the definitive guide to family law in the United Kingdom.

Exhaustively researched and updated, its forensic dissection of family law not only exposes the obscenity of our brutal and secretive Family Courts, but also provides Litigants in Person with indispensable advice and information on how you can overcome the system and secure meaningful parenting time with your children.

As family breakdown and mass fatherlessness reach epidemic proportions, and the Family Courts become congested with increasing numbers of Litigants in Person who cannot afford legal representation, the value of this tome to parents has significantly increased. For any parent who is caught in the tractor-beam of family breakdown and the Family Courts, this book is an essential publication to be read, read and read again.

Because of the comprehensive size of the book and to keep it affordable, it is only available in an e-Book format.

It is impossible to place a value on Nick's work and the assistance it will bring to parents everywhere, but it is a tribute to him and everybody else who has contributed to Fathers 4 Justice over the years that this vital piece of work for parents is painstakingly assembled, researched and updated on a regular basis. Many have tried to copy the Handbook, but none has come close.

Our hope is that one day such a publication will be consigned to history, replaced as it will be by a fair, just, equitable and transparent system of family justice that will make the need for groups such as Fathers 4 Justice redundant.

Finally, for parents suffering what I describe as the 'living bereavement' of not seeing your children, there are two valuable lessons I would like to share with you. The first is to learn the F-word. That word is forgiveness. Do not let bitterness and rancour twist and strangle the very life out of your family and your children. No matter how impossible this might seem at times, if you can forgive, then you can stay human and begin to move forward.

And finally, never, ever, hate your ex-partner more than you love your children.

Matt O'Connor, Founder, Fathers 4 Justice, October 2011

PREFACE

> *And the significance of this great organisation, gentlemen? It consists in this, that innocent persons are accused of guilt, and senseless proceedings are put in motion against them.*

Franz Kafka, *The Trial*, 1925

About the Author

Nick Langford has been the Research Director for Fathers 4 Justice since 2006 and is also the author of the Fathers 4 Justice publication *Family Justice on Trial: Opening the Door on Closed Courts*.

Nick read English Language and Literature at St Peter's College, Oxford, and has spent his career in theatre and television as a technician and lighting designer. He currently instructs in technical theatre at an FE college.

Nick joined Fathers 4 Justice in 2003 when his ex-wife and her new husband moved from Hampshire to Scotland with his son Thomas and thereafter prevented all further contact.

Nick had no contact at all with his son for 7½ years, but in October last year Thomas, then nearly 16, came to live with him permanently. Nick hopes his story will inspire other fathers never to give up hope.

In his spare time Nick is involved in the Butser Ancient Farm experimental archaeological project which investigates domestic and agricultural life in the Iron-Age.

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About Fathers 4 Justice

The civil rights group **Fathers 4 Justice** was founded in December 2002 by Matt O'Connor after he had experienced first-hand the injustices of the secret Family Courts as he struggled to see his two sons Daniel and Alexander following a traumatic divorce.

Started as a vehicle for social change, Fathers 4 Justice quickly became the high-wire act of protest groups, whether powder-bombing Prime Minister Tony Blair in the House of Commons, scaling the balcony at Buckingham Palace in a Batman Costume, invading the Pulpit at York Minster during a General Synod Service or taking the National Lottery Draw off air in front of ten million viewers.

But behind the headlines and dramatic protests was a new creed for family law enshrined in the documents *Blueprint For Family Law In The 21st Century* (2003) and *Family Justice On Trial: Opening The Door On Closed Courts* (2007). These pioneering, ideas-led documents set out radical and visionary frameworks for a fair, just, open and equitable system of family law.

O'Connor temporarily suspended operations on 18th January 2006 after extremist elements from splinter groups were accused in the Sun newspaper of plotting to kidnap the Prime Minister's son, Leo. At the time O'Connor said, 'We are in the business of reuniting children with their fathers, not separating them.' The group resumed its activities on May 20th 2006 with its controversial *Family Law Lotto: Next Time It Could Be You* protest on BBC1. Fathers 4 Justice was temporarily wound up in September 2008.

In April 2010, following the failure of alternative groups to advance the equal parenting agenda, Fathers 4 Justice reformed in order to finish the job it had begun, combining constructive engagement with direct action. A new website was launched, a new and rapidly expanding Facebook presence was established and regular support clinics were held. Discussions with the Conservative Party led to the remarkable commitment from them outlined in Chapter 1.

Failure to honour this commitment resulted in Matt O'Connor's *Hunger 4 Justice* hunger strike outside David Cameron's constituency home in July 2011 and the very successful protest *In the Name of our Children* at Buckingham Palace on 24th September to coincide with the Changing the Guard ceremony.

Fathers 4 Justice campaigns not merely in the name of the father, but also in the name of all parents, grandparents and children seeking equality in family law. The achievements of Fathers 4 Justice are best described by The Times newspaper which wrote in January 2006:

> *Fathers 4 Justice caught the spirit of the times: they reflected the zeitgeist, and they changed it... for all the flaws within F4J, the issue of fatherhood has a currency that would have been unimaginable three years ago... when historians look back on British Society at the start of the third millennium, they will accord a small but important chapter to the men in tights.*

In just a few short years Fathers 4 Justice not only effected 'climate change', but it also succeeded in discrediting the secret Family Courts and undermining public confidence. The result was to force the Labour Government to advance proposals to open up the secret Courts to greater scrutiny and propose tougher enforcement of Contact Orders, and the Conservatives to pledge reform of family law pending the findings of the Family Justice Review.

Why Fathers 4 Justice?

Fathers 4 Justice believe that you are the best person to parent your children: to care for them, to make decisions regarding them, to raise them to adulthood. The State is a very poor parent. We believe, however, that over the last half century the State has stolen parents' authority for itself, intruding ever further into private families and homes, and arrogating from parents the right to make decisions, infantilising parents in the process.

The State justifies this by claiming to make these decisions 'in the best interests of the child'. Parents are no longer trusted to have their children's best interests at heart, these are decisions which must now be taken by faceless, unaccountable officials who do not know your children and do not love them.

We agree with Charles Dickens that,

> *The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings.*

Dickens had not encountered the welfare state, a vast amorphous infestation of the body politic which hungrily sniffs out new opportunities for invasion and colonisation. In the UK and across the developed world the family justice and child protection systems have become massive employers. Family breakdown boosts the economy: broken families need two of everything. The State thus has a significant vested interest in family breakdown, and in carving up your family.

Fathers 4 Justice have little time for the wilder conspiracy theorists. Most of what is wrong in the family justice system can be explained by Dickens' principle, and by the greed of lawyers and State agencies and by the craving of social workers to pry into other people's business. It is, moreover, a system which operates in secrecy, without outside scrutiny, and its employees, particularly judges and CAFCASS officers, are largely unaccountable. That encourages sloppy practices, the covering up of mistakes and the adoption of ideology and temporarily fashionable theory.

We are aware, of course, that state institutions are heavily influenced by left-wing politics; that Marxism, feminism and political correctness dominate most departments and agencies. It is no secret that one of the fundamentals of Marxism is the destruction of the family, or that Marxism's illegitimate daughter, feminism, views marriage as 'a seething nest of abuse from which battered wives and molested

children may at any time need to be rescued'.[1] The child protection system excuses its intrusion into the home by pointing to cases like that of 'Baby P', but cases like that only happen in broken, dysfunctional families from which fathers are excluded, never in married ones; if there is no abuse taking place before separation it is unlikely that it will start immediately after. As philosopher Roger Scruton observed,[2]

> *What Baby P needed was a father, and the smallest dose of pessimism would have pointed this out... fathers instinctively protect their children.*

Fathers 4 Justice believe the present situation must not be allowed to continue: the State must leave normal families to get on with their lives, making their own mistakes and learning from them, and intrude only when asked or where absolutely necessary. We believe especially that parenting disputes must be taken out of the Family Courts where they are rarely helped towards resolution and are more likely to languish or to escalate. We advocate the greater use of therapeutic mediation and early intervention, and above all a system which views parents as equals and collaborators, and not as adversaries and cash cows fit only for exploitation.

[1] Peter Hitchens, *The Abolition of Liberty*, Atlantic Books, 2003
[2] Roger Scruton, *The Uses of Pessimism and the Danger of False Hope*, Atlantic, 2010

WE ARE FAMILY
WE ARE FATHERS4JUSTICE™

Dedication

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Acknowledgements

I am greatly indebted to the many people whose experience and wisdom have provided the advice in this guide and on whose shoulders I have stood; these, in alphabetical order, are some of them: Charles Adams, Rich Adams, Stephen Baskerville, Steve Bayliss, William 'Beau' Beckett, John Bolch, Jenny Bostock, Rich Castle, Ivor Catt, Graeme Cook, Tony Copley, Martin Cottrell, Michael Cox, Ron Davis, Greg Downing, Francis Edwards, Dave Ellison, Barry Gaynor, Eddie 'Gold-tooth' Gorecki, David McGregor, Mark Montague, Shaun O'Connell, Matt O'Connor, Nadine O'Connor, Michael Pelling, Michael Sadeh, Jolly Stanesby, Andrew Watson, Alain Williams and anyone else whom I may have forgotten.

Nick Langford M.A. (Oxon.) October 2011

WE ARE FAMILY
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TOP TIPS

1. Responsibility for your child lies with you and with his other parent – never with anyone else. Now and for ever.
2. Never try to try to deny your child the love of the other parent.
3. Always place your child's needs before your own.
4. Stay positive, fit, healthy and teetotal for the duration of your case.
5. Be the first to petition for divorce, and get every application in before your ex does.
6. Delay is fatal. Take your next step today.
7. Mediate only if your spouse is mediation material. If you can't work it out together, get to Court.
8. Never confess to a false allegation or make one you cannot prove.
9. Keep your Chronology up-to-date; make notes of everything.
10. Access your Court File regularly; it is your right.
11. Do not let yourself be forced out of your house.
12. Close any joint bank accounts before they are emptied.
13. Do all you can to support other parents in need.
14. Do not make your home a shrine to your lost child.
15. Never hate your ex-partner more than you love your child.

GLOSSARY

Note: Just click on the terms in this glossary to take you to the relevant part of the Handbook.

Abridged Notice – an application for a hearing to be held at short notice, typically 48 hours.

Adoption – the transfer of the legal rights over a child from the natural parents to the adoptive parents.

Adultery – consensual sexual intercourse between a married person and someone of the opposite sex other than their spouse. Infidelity without intercourse is not adultery in law.

Advocate – one who is authorised to speak on behalf of another; usually a barrister or solicitor-advocate.

Affidavit – a written statement of evidence made under oath.

Alternative Dispute Resolution – the resolution of residence and contact disputes without using the adversarial court process.

Ambush – a party 'ambushes' the other party by introducing into the oral evidence he gives in Court something not contained in a position statement (q.v.) or affidavit (q.v.), or by making a new allegation.

Amicus Curiae – (Friend of the Court) one who volunteers to assist the Court on a point of law.

Ancillary Relief – see Financial Remedies.

Annulment – legal process to declare a marriage null and void, i.e., it never existed.

Answer – document filed by respondent in divorce proceedings giving response to allegations in petition (q.v.).

Appeal – a complaint made to a higher court in order to correct an error made in a lower court.

Appellant – the party who lodges an appeal (q.v.).

Applicant – the party who applies to the Court for an order.

Backsheet – final page of a court document giving document title, court details, case number, parties' names, etc.

Barder Event – an event which occurs after the making of a financial order which invalidates the basis, or fundamental assumption, upon which the order was made.

Barrister – also called 'counsel'; a more specialised and experienced lawyer usually engaged by a solicitor rather than directly by a litigant to act as an advocate. Barristers have greater rights of audience (q.v.) in the higher courts, but are not attorneys and cannot conduct litigation.

Best Interests of the Child – a meaningless phrase used to justify any action by the State contrary to the child's welfare.

Bundle – a file or files presented to the Court containing all the pertinent documents of a case.

CAFCASS – The Children And Family Court Advisory and Support Service: an organisation misguidedly entrusted to protect the interests of children during proceedings.

Capacity – the intellectual ability to understand a case and give instructions to a solicitor. Someone who lacks capacity through mental illness or learning disability may be aided by a litigation friend (q.v.).

Care – process by which the State 'protects' children deemed to be 'at risk', usually by forcibly taking them from their parents.

Case Conference – meeting conducted by social services and others to determine what action they should take regarding a child.

Certificate – awarded by the Legal Services Commission to guarantee your Legal Aid.

Chambers – a judge's office; the expression 'in chambers' is used to translate the Latin *in camera*, referring to a hearing conducted in private. Also a group of barristers and the premises they occupy.

Child – in most family proceedings, a person under the age of 18. In adoption proceedings, a person under the age of 18 when proceedings commence, and in Hague Convention proceedings a person under the age of 16.

Child of the Family – the biological child of a married couple or any child who is treated by the couple as their child, but *not* a fostered child. The term is defined under the Matrimonial Causes Act 1973, Section 52.

Children and Family Reporter (CFR) – a CAFCASS officer who has been asked to prepare a welfare report (q.v.).

Children's Guardian – formerly known as a Guardian *ad litem*; a CAFCASS social worker appointed by the Court to represent your child's interests under **Rule 16.3(1)** of the Family Procedure Rules 2010.

Child Support – tax on fatherhood designed to offset the cost of benefits paid to single mothers.

Chronology – a list in chronological order of every event, letter, phone call, etc., pertinent to your case.

Civil Partnership – the Civil Partnership Act 2004 allows same sex couples to register their relationship and acquire rights and responsibilities similar to those of a married couple.

Clean Break – a one-off Court Order finally determining financial arrangements (rarely possible where there are children).

Collaborative Law – a non-adversarial, non-competitive approach to resolving disputes cooperatively using specialist lawyers.

Committal – sending a party to prison.

Common Law Husband or **Wife** – a myth. Cohabitation does not confer the same legal rights as marriage.

Conciliation – an ineffective form of alternative dispute resolution which takes place in-court under the direction of the judge or CAFCASS.

Conclusions – (Scottish) the first part of an application, specifying the order desired.

Condescendences – (Scottish) the second part of an application, equivalent to the English Position Statement (q.v.).

Conditional Order – see Decree Nisi.

Connell Order – a form of order made for spousal maintenance.

Consent Order – an order made in the terms of the application to which the respondent is presumed to have consented.

Contact – formerly called access; any interaction, however slight or indirect, between a child and his non-resident parent.

Contact Centre – facility provided usually on a commercial basis in which an estranged parent and child can have contact under the terms of a Court Order.

Contact Order – vain hope that a person with care will allow the child to have contact with the person named in the order.

Contact Parent – the parent in whose favour the Contact Order is made; the parent who has only the status of a visitor in his child's life.

Contemnor – a person who has been found guilty of contempt.

Contempt – refusal to comply with a Court Order or with court rules.

Co-Respondent – the person named in the Petition (q.v.) as having committed adultery (q.v.) with the Respondent.

Court – an institution with authority to decide legal disputes and dispense justice; also the room or building in which this takes place. The term is often interchangeable with 'judge(s)'.

Court of Session – the higher court in the Scottish judicatory.

Cross Application – where two parties make the same application; e.g. for residence.

Cross-Examination – questioning of a witness by a party other than the party who called the witness.

Cross-Petition – document containing contrary allegations filed with the Answer (q.v.) to defend a divorce.

Curator ad Litem – (Scottish) a solicitor who prepares a welfare report and acts like an English Children's Guardian.

Decree Absolute – the final stage of the divorce process, enabling you to re-marry.

Decree *Nisi* – a preliminary stage of the divorce process: you are divorced *unless* (nisi) someone objects.

Defender – (Scottish) the Respondent.

Deponent – a person who gives evidence by affidavit, affirmation or deposition.

Diet – (Scottish) a hearing.

Direction – an instruction by a judge contained within an order for someone to do something, e.g. write a statement, prepare a report.

Directions Hearing – a hearing at which the judge makes directions. The FHDRA is the first directions hearing.

Disclosure – revealing confidential court documents to other parties. Improper disclosure is contempt (q.v.).

Divorce – the final dissolution of a marriage, sanctioned by a court.

Divorce Industrial Complex – term coined by the US campaigner Stephen Baskerville to describe the huge industry of judges, lawyers, counsellors, social workers and other parasites who feast on and promote divorce and family breakdown.

Domestic Violence (DV) – violence, abuse or threatening or controlling behaviour between any two people in an intimate relationship. DV has become so politicised that a non-contentious definition is impossible.

DX Number – a law firm's unique identifying number for the Document Exchange: a service which stores and distributes legal documents.

Edgar Agreement – a pre- or post-nuptial agreement in which one party changes their mind. Named after the case **Edgar v Edgar [1980] EWCA Civ 2**.

Evidence in Chief – evidence given by a witness for the party who called him.

Examination – the questioning of your witness. Cross-examination is the questioning of the other party's witness.

Exhibit – document attached to an affidavit (q.v.) and referred to by a letter of the alphabet.

***Ex Parte* Hearing** – (Latin: 'by a party') a hearing at which the respondent party is not present.

False Allegation – untrue allegations of domestic violence or child abuse intended to delay proceedings, disrupt contact or enable qualification for legal aid.

Family Assistance Order – an order enabling CAFCASS to give help to a family before a decision is made on the final order.

Family Breakdown – the forced removal of the father from his family.

Family Court Advisor (FCA) – the CAFCASS officer who interviews the parties and children and then advises the Court on the appropriate decision to make in a case.

Filing – delivering a document by post or otherwise to the Court office.

Final Order – see Decree Absolute.

Final Hearing – the hearing at which the judge theoretically makes his final decision.

Financial Remedies – financial settlement to a spouse on divorce.

Finding of Fact Hearing – a hearing convened to establish the truth of allegations.

First Hearing Dispute Resolution Appointment (FHDRA) – your first meeting with the judge at which a timetable is established to resolve the dispute.

Freeing Order – Court Order which frees a child for adoption (q.v.).

Full Hearing – a hearing usually spread over several days once all reports are in and at which an order -is made.

Gate-Keeper – a parent (usually the mother) who believes they have the right to control access to their child by the other parent.

Gillick Competent – (or just 'competent') sufficiently mature to understand the implications of a case and to make decisions accordingly. Gillick Competence is determined by intellectual comprehension, not age.

Go Order – an injunction made by a police officer without a court's involvement to remove someone from their home for up to 48 hours.

Guardian *ad Litem* – see Children's Guardian.

Heads of Agreement – a written summary of an agreement – usually financial – which can be worked up into a Court Order if the Court thinks it necessary or appropriate.

Hearing – a court session conducted before a judge.

Hearsay – a statement which is not given in oral evidence in proceedings, but which is nevertheless accepted as evidence.

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Implacable Hostility – irrational and merciless opposition to contact.

In Camera – Latin for 'in a chamber' and thus also 'in chambers'. A hearing conducted in private to which press and public are not admitted (a hearing in open court is *in curia*).

Indirect Contact – a cynical device allowing courts to end parents' relationships with their children without making orders for no contact.

Inherent Jurisdiction – the ability of a High Court judge to make an order beyond what is specifically enabled by Parliamentary legislation.

Injunctive Orders or injunctions – an order obliging a party to do something or prohibiting them from doing something.

Interim Order – a temporary order made for example while reports are prepared to ensure that the situation does not deteriorate.

Interlocutor – (Scottish) the sheet of paper on which the Court Order is written.

***Inter Partes* Hearing** – a hearing at which all parties are present.

Intervenor – a third party who becomes involved in a case because of a specific issue – for example, if they have been accused of harming a child.

Join as a party – most cases involve two parties, the mother and the father, but if you have a vested interest in the case – as a grandparent or older sibling, perhaps – you too can become a party to the case by requesting the Court that you be 'joined as a party'.

Joint Residence – order awarding residence to two adults – e.g. in a same-sex relationship – who live in the same house. Also used confusingly as a synonym for shared residence (q.v.).

Judge – an officer of the Court who rubber-stamps recommendations made by CAFCASS. Also referred to as 'the Court' or 'the bench'.

Judgement – (or judgment) the spoken or written decision of a judge and the reasoning behind it. I prefer the 'Oxford' spelling.

Jurat – Latin: 'he swears'; the clause at the end of an affidavit (q.v.) stating the date, place, and name of the person before whom it was sworn.

Jurisdiction – a court's geographical area of influence; also its legal power to intervene. Usually refers to England and Wales.

Lay – a 'lay' person is one who is not legally qualified, such as a magistrate or McKenzie Friend (q.v.).

Leave – the permission of the Court.

Leave to Remove – an application to remove a child from the Court's jurisdiction into that of a different court.

Legal Aid – funding from the taxpayer to enable you to pay the extortionate costs of lawyers and other court services.

Lenocinium – (Latin:) in Scottish law, condonation of adultery, and therefore a defence against a divorce petition which cites adultery.

Liability Order – order enabling the CSA to enforce payment; no longer necessary as a result of recent legislation.

Litigant-in-Person – a party to a case who attends court without representation by a lawyer. Referred to in Scotland as a Party Litigant.

Litigation Friend – someone who assists a party who lacks capacity (q.v.).

Locus Standi – Latin: 'standing' – the ability of an applicant to show the Court that he has sufficient interest in a case to participate in it.

Maintenance – money paid by a spouse for the financial support of the other.

McKenzie Friend – an unqualified person who gives up a great deal of his or her time to accompany and assist Litigants-in-Person in Court.

Mediation – alternative dispute resolution which is attempted before the Court process becomes necessary.

Mesher Order – an order preventing the sale of the matrimonial home and allowing the mother to remain in residence with the children until a triggering event such as the youngest child leaving university.

Mirror Order – in leave to remove (q.v.) cases an order made in another (usually non-Hague) country and in identical terms to an order made in the child's home country to enable enforcement of that order.

Motion Roll Hearing – (Scottish) an interim hearing.

No-Fault Divorce – the removal from divorce legislation of the requirement that the petitioner prove the respondent to be at fault.

Non-Molestation Order – an injunctive order, breach of which is a criminal offence, made in order to criminalise an otherwise lawful and reasonable activity.

Non-Resident Parent (NRP) – the parent who is not in receipt of child benefit and who must therefore pay child support.

No-Order Principle – the principle that a court should prefer not to make any order unless making an order is unavoidable.

Obiter – (short for *obiter dictum*, Latin for 'said in passing') the asides, illustrations, analogies and references to prior judgements within a judgement, but not the meat of the argument.

Obtemper – verb, to comply with (a Court Order).

Occupation Order – an order made about who can live in a house. It can restrict a party's occupation to specific parts of the house or times or exclude him entirely, or it can give another party exclusive right to occupy the house.

Official Copy – copy of an official document supplied and marked as such by the office which issued the original.

Official Solicitor – official who gives instruction on behalf of someone who lacks capacity.

Options Hearing – (Scottish) the first hearing, equivalent to a Directions Hearing (q.v.).

Orse – Latin: 'otherwise'.

Overriding Objective – the requirement that courts conduct proceedings 'justly', having regard to any welfare issues involved.

Parental Alienation – conscious or unconscious behaviour by a parent which distances a child from the other parent. An alienated child may exhibit 'Parental Alienation Syndrome'.

Parental Responsibility – both the responsibilities and the rights a parent has to their child. Mothers have PR automatically; fathers have it only through the mother..

Parenting Plan – your detailed proposal for the day-to-day shared parenting of your child once you are granted an order.

Part-Heard – a case in which a hearing is adjourned until another day because time has run out is 'part-heard'.

Party Litigant – (Scottish) a Litigant-in-Person (q.v.).

Penal Notice – a warning clause added to an order that breach of the order will result in committal.

Per Incuriam – Latin: 'through lack of care', usually referring to an order made without proper consideration of the appropriate legislation or precedents. A judgement ruled *per incuriam* cannot be used as a precedent.

Person with Care (PWC) – the parent in receipt of child benefit who provides day-to-day care of a child.

Petitioner – the party who petitions for divorce.

Placement Order – Court Order authorising a local authority to place a child for adoption.

Pleas-in-Law – (Scottish) the third part of an application, giving the legal argument.

Position Statement – the document in which you set out your case clearly and succinctly to the Court.

Practice Direction – instructions issued to judges to achieve conformity and uniformity in court practice.

Precedent – a judgement of a higher court which establishes a legal principle all lower courts must follow. A precedent has two parts, the *ratio*, which details the precedent itself, and the *obiter*, which is the rest of the judgement apart from that part containing the precedent.

Pre-Marital or **Nuptial Agreement** – a written statement agreed by a couple before marriage, setting out the division of financial assets and other details in the event of their divorce.

Privilege – a party's right in certain protected situations such as a court hearing to refuse to disclose or produce a document or to answer a question of some special interest recognised by law.

Pro Bono – short for the Latin '*pro bono publico*', meaning 'for the public good.' Professional legal work undertaken voluntarily and without payment.

Proceedings – normally refers to family proceedings as defined by Section 75(3) of the Courts Act 2003.

Process Server – often a private investigator who also specialises in serving legal documents on respondents.

Prohibited Steps Order – an order preventing or limiting the normal exercise of Parental Responsibility.

Pursuer – (Scottish) an Applicant.

Ratio – (short for *rationes decidendi*, Latin for 'the rationale for the decision') what part of a judgement which contains the judge's reasoning and may set a precedent.

Recital – an item of background information placed at the top of an order which does not constitute part of the order itself; it may record why the order was made, or an agreement the parties have reached.

Recovery Order – Court Order made to parents, police or social services to find a child and return him to those with Parental Responsibility.

Recuse – to disqualify a judge from presiding over a case on the grounds of prejudice or personal involvement.

Removal from the Jurisdiction – taking a child out of the geographical jurisdiction of the Court.

Reserve – a judge may 'reserve' a case to himself to ensure judicial continuity, meaning that no other judge may hear it. This right can be abused.

Residence – formerly called custody; the legal custodianship of a child, and right to make all decisions regarding that child without reference to the other parent.

Residence Order – Court Order determining with which parent a child shall live following separation.

Respondent – the party to whom the order applied for by the applicant will apply.

Rescission – the act of setting aside an order.

Revised Family Law Programme – a scheme of case management introduced in April 2010 and designed to reduce demand for and pressure on CAFCASS and the family justice system and to expedite the progress of cases through the system.

Right of Audience – the right, bestowed by the judge, to address the Court.

Rose Agreement – a heads of agreement (q.v.) which has not yet been worked up into an order but which is approved by the judge and is therefore binding on the parties. Named after the case **Rose v Rose [2002] EWCA Civ 208**.

Schedule 2 Letter – the initial stage of the Revised Family Law Programme which aims to determine whether the involvement of CAFCASS is necessary in a case.

Scott Schedule – a document prepared as a table with, commonly, the applicant's allegations in one column and the respondent's refutations in another.

Section 7 Report – a report ordered by the Court under Section 7 of the Children Act 1989 from CAFCASS in order to determine the welfare issues of a case.

Section 8 Order – one of the orders made under Section 8 of the Children Act 1989 for residence, contact, specific issues or prohibited steps.

Section 9 Judge – a judge allowed to sit as a High Court Judge.

Section 37 Report – a report produced by a local authority investigating your child's circumstances and ordered by the Court under Section 37 of the Children Act 1989.

Section 47 Report – a report the Court will order the local authority to prepare under Section 47 of the Children Act 1989 to determine whether a child is suffering or is likely to suffer significant harm.

Section 91 Order – an order made under Section 91 of the Children Act 1989 prohibiting the party to whom it applies from making further applications for the duration of the order.

Section 97 Prohibition – the prohibition in Section 97 of the Children Act 1989 preventing the identification of children in Children Act proceedings.

Seal – a mark placed on a document by the Court to indicate that the Court has issued it.

Segal Order – a form of order made for spousal maintenance.

Seized – a court is 'seized' of a case when it has sufficient evidence to pass judgement.

Service – the action of bringing a document to someone's attention according to the rules of court.

Set Aside – to cancel a judgement or order; so doing is referred to as 'rescission'.

Settled – (of an abducted child) beyond repatriation.

Shared Residence – a legal arrangement whereby both parents are considered to play an important role in their child's life.

Sheriff – a judge in the Scottish judicatory.

Sheriff's Court – the lower level of court in the Scottish judicatory.

Slip Rule – rule which allows clerical mistakes and accidental omissions in judgements and orders to be corrected by the judge.

Solicitor – a lawyer who practices litigation but not advocacy (the conducting of proceedings), for which he will engage a barrister.

Specific Issues Order – an order by which the Court assumes Parental Responsibility (q.v.) over a particular question concerning a child.

Split Hearing – a hearing in two parts: in the first the Court makes findings of fact, and in the second decisions based upon those findings.

Statement of Arrangements for Children – a form sent to the Court with the divorce petition setting out proposed arrangements for the children.

Status Quo – the established state of affairs. Also given as *status quo ante*; appropriately the original Latin is, *in statu quo res erant ante bellum*: in the state in which things were before the war.

Stay – a halt on proceedings, other than those allowed under the terms of the stay. If an order is being appealed, the Court may grant a 'stay of order' which prevents the term of the order being implemented.

Strike Out – the Court's refusal to take a case because it has no hope of success or the order of a court to delete written material so that it may no longer be relied upon.

Subpoena – (Latin: under penalty) a writ from the Court requiring a party or witness to attend, failure to comply with which is contempt.

Supervised Contact – contact conducted in a contact centre (q.v.) under supervision by the centre staff where the parent and child are isolated from other families.

Supervision – part of care process by which social services may monitor a child considered to be at risk.

Supported Contact – contact conducted in a contact centre (q.v.) under supervision by the centre staff where the parent and child are in the same room as other families.

Threshold Criteria – those factors which determine whether or not a certain action should be taken, such as taking a child into care.

Time Limits – the Court computes time limits in terms of 'clear days'; the day on which the period begins and the day on which an event occurs ending the period are not included. If the period is 7 days or shorter only business days count.

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Tipstaff – (plural: tipstaves) an officer of the High Court with power of arrest and various duties including delivering prisoners to court and receiving abducted children.

ToLATA (the Trusts of Land and Appointments of Trustees Act 1996) – legislation enabling the Court to decide whether you have a claim to a share of a property, how much that share is and whether or not the property should be sold.

Undertaking – a commitment made to the Court that you will do or not do a specified act.

Unilateral Divorce – a decision to end a marriage made by one spouse only and without reference to the other until he receives the divorce papers.

Unpaid Work Requirement – an Enforcement Order of between 40 and 300 hours of unpaid work which must be of benefit to the community; formerly called Community Service.

Unreasonable Behaviour – any excuse for a divorce.

Variation – once an order has been made, a party can make a further application to have it varied in some way.

Vexatious Litigant – one who brings litigation allegedly merely to vex or harass the respondent.

Visiting Contact – contact without overnight staying.

Warning Notice – a notice attached to a Contact Order warning of the consequences of disobeying the order.

Welfare Checklist – that part of the Children Act 1989 which sets out the matters to be considered in relation to a child's welfare.

Welfare Officer – a CAFCASS officer who has been asked to produce a welfare report.

Welfare Principle or 'paramountcy principle' – the principle that a child's welfare – or best interests – must always come before every other consideration, i.e., be paramount.

Welfare Report – also referred to as a Section 7 report; the report provided by the CAFCASS reporter advising the Court on what decision is appropriate.

Without Notice – an application made to the Court or an order issued by the Court without the respondent present.

Without Prejudice – an indication the other side are prepared to cut a deal; protective wording on an offer of settlement to ensure that if refused it will not be shown to the Court and prejudice proceedings. If the judge sees it he may have to recuse himself. Used in financial matters but not appropriate to children's proceedings.

Witness – a person who gives evidence by witness statement to support the argument of a party or who attends Court to speak on their behalf.

INTRODUCTION: 3 PRINCIPLES

> *Family law in this country is a perversion of the course of natural justice. It trashes lives, destroys childhoods, tears families apart, strips them of their savings; it even pitches parent against parent. It criminalises and crushes you before suffocating you with a blanket of secrecy and censorship. It's like being buried alive.*

Matthew O'Connor, founder of Fathers 4 Justice [3]

0.1. Family Justice Review

This is the latest version of the Fathers 4 Justice Handbook (the seventh, I think). I had naïvely hoped that the previous version might be the last. On 31st March 2011 the Family Justice Review panel published their interim report into the family justice system. Set up in January 2010 by the Labour Government, the review was an opportunity finally to get to grips with the underlying failings of family law and to put in place a fully reformed and coherent new system. Sadly the composition of the panel and the restrictions of their remit made that impossible.

Despite the commitment made by the Conservatives prior to the 2010 General Election to commission a full review of the family justice system that Autumn, once in power the Coalition chose instead to piggy-back on Labour's doomed review under the chairmanship of Sir David Norgrove.

The outcome was predictable; the report betrayed the public law backgrounds of its panel members and they interpreted private law in public law terms, thus they overestimated the relevance of violence and abuse to private law disputes.

[3] Matt O'Connor, *Fathers 4 Justice: the inside story*, Wiedenfeld & Nicholson, 2007

The report seemed blind to the failure of the courts to promote contact between children and their parents and rejected the demands of parenting groups for a rebuttable presumption of shared parenting; instead it proposed a vague 'general statement of intent' inserted into legislation affirming the importance of a child maintaining a relationship with both parents – this was a sop thrown to campaigners, but fell far short of recognising the equality of parents. The panel's public law background led it to believe that shared parenting was in some way likely to be harmful to children, a position it justified by ignoring all evidence and research to the contrary.

It had been hoped the report would recognise the role that grandparents can play by removing the requirement that they obtain the Court's prior permission before making a contact application, but the panel rejected this proposal.

It had also been hoped that the panel would recommend strengthening judicial scrutiny in care proceedings, which rarely represents more than a rubber stamp. In fact the panel proposed weakening scrutiny even further.

At the time of writing we still await the final report of the committee, but there is unlikely to be anything in it to reassure parents. The main thrust of the report was to improve administration and efficiency of the system, while leaving its preconceptions and ideology intact.

None of the proposed measures represented the wholesale integrated reform called for by campaigners and so desperately needed; the system will continue to be set up – in common with other public services – to benefit its employees rather than the end users. The changes pursued by the Government, already prefigured to some extent in statements by Iain Duncan Smith and the justice minister Jonathan Djanogly, are likely to be driven more by funding considerations than by the interests of families. Calls for a comprehensive review of the system with a panel representative of the system's users met with contempt and ridicule – how could parents possibly have a reliable view on such things?

It's a fair bet that if you have bought a copy of this e-Book you already know quite a bit about the operation of the Family Courts and the problems with the UK's calamitous family justice system. If you want a more complete introduction to this system, we advise you to read our dossier *Family Justice on Trial*: *Opening the Door on Closed Courts*, which is available from our website.

For now, we want to present to you three fundamental concepts which overwhelmingly dominate decisions made both in the UK Family Courts and in all other jurisdictions in which family law fails families.

0.2. The Paramountcy Principle

0.2.1. The history of welfare

The first principle, and the first clause of the Children Act 1989, the so-called 'paramountcy' or 'welfare' principle, is that the Court's paramount consideration must always be the welfare of the child

subject to proceedings; this is also referred to as the 'best interests of the child'.

A rather peculiar claim by some fathers' rights activists is that the principle was devised in 1935 by Heinrich Himmler, no less, as part of the Lebensborn eugenic breeding programme. This is not true (it would be wonderful if it were!), though the misunderstanding may derive from Hitler's own comment in *Mein Kampf* that,

> *The State must declare the child to be the most precious treasure of the people. As long as the government is perceived as working for the benefit of the children, the people will happily endure almost any curtailment of liberty and almost any deprivation.*

In fact, the welfare principle has been fundamental as long as there has been law in England relating to children. Historically the first relationship between adults and children which necessitated legal regulation was that of guardianship. For most of our legal history the natural guardian of a legitimate child has been his father, but there has always been a need in the event of a father's death, incapacity, destitution or absence for another male adult to step in as guardian. In feudal times a child would only acquire a guardian if he had property to be administered until he reached the age of majority, and the guardian would usually be his lord.

Guardianship combined legal authority over a child with a duty of care towards the child's person and his property, it was a sound principle, established through long standing tradition and one which served children well. Guardianship was based on duty, with rights accorded by the Sovereign only so far as they enabled the performance of duty. Failure to perform that duty justified removing the child from the guardian's custody, but only when guardianship benefited the child; where it benefited the guardian the Court could not intervene. It is in this custom of guardianship, condemned by feminists as 'patriarchal', that the principle of the child's welfare and child protection paradoxically have their origin.

This principle of duty duly came to be applied to parents. The law was based on guardianship, not on custody, and thus a father who failed in his duty or abused this trust could have custody taken from him. On the death of a father the mother could become 'guardian for nurture' of all his legitimate children under the age of 14 (but not of their property), provided there was no other claim.

In the early 19th Century the law still generally yielded to the father as the best person to make decisions for his children; Lord Justice Bowen said in 1883,[4] 'the father knows far better as a rule what is good for his children than a court of justice can'. The justification was largely economical: only fathers had the means to provide children with food, shelter, education and security.

The Court of Chancery was the first to introduce the argument of the child's *interests* as justification for limiting a father's rights; custody proceedings focussed on the grounds for intervention: the presumption of care had to be displaced before guardianship could be transferred. Thus a father's right to custody was subject to the

[4] Re Agar-Ellis [1883] 24 Ch. D 317

child's welfare, and a father's authority was effectively held in trust – it was not a power.

In 1839 the Custody of Infants Act followed a parliamentary campaign by Caroline Norton, who had been refused custody of her three sons and denied access to them. The Act allowed for the first time a separated woman to petition a court for access to her children under the age of 7 during their father's lifetime, provided she was of 'good character', i.e. innocent of adultery.

The Custody of Infants Act 1873 removed the restriction on adultery and allowed mothers to apply for the custody of their children under the age of 16, provided the father or guardian was allowed access. The Guardianship of Infants Act 1886 allowed a mother to become her child's guardian on the death of the father, but only jointly with whomever he had appointed; this Act also provided for the child's welfare to be a consideration for the Court in custody disputes when considering the mother's application. On this ground, and through giving women more opportunities to win custody after divorce, these Acts began to undermine a father's sovereignty over his children.

Nevertheless, by the end of the century the central pillar of family law was still the cohesion and autonomy of the patriarchal married family. Judgements transferring guardianship from fathers were not enforced by the courts, compelling Parliament to legislate in order to affirm the rights of children and mothers and to curb the judiciary's unquestioning support for paternal rights. The interests of the child became dominant. Legal reform remained cautious but steadily evolving, promoting the rights of women and their children, but at the same time preserving the stability of the family.

The motive to diminish fathers' authority was not a pressing need occasioned, for example, by thousands of children losing all contact with their mothers. The motive was not even real equality: the desire of the early feminists – led by Eleanor Rathbone, president of the National Union of Societies for Equal Citizenship (NUSEC) – was to transfer the authority over their children previously enjoyed by men onto women. The first step in this process was the Matrimonial Causes Act 1923 which removed much gender inequality from legislation and enabled women to divorce their husbands on the grounds of adultery.

A proportion of the opposition to NUSEC's lobbying was inevitably driven by open and vocal misogynism. The argument that fathers were, by virtue of being the chief wage-earner and better educated, better able to look after their children's interests was by now becoming anachronistic. A more persuasive case, memorably expressed by Lord Asquith's report into the Guardianship of Infants Bill, argued against the division of parental authority on purely practical grounds,[5]

> *One man alone must dictate the course and prescribe the speed. Divided counsels in bad weather would make for ship-wreck, even though both parties aspired to save the ship.*

A graver argument was that granting both parents legal authority over a child would necessitate resolving in Court any disagreement over their children which arose between the parents; this was intolerable for two reasons,

[5] Draft Report from the Joint Committee of Lords and Commons to consider the Guardianship of Infants Bill given a second reading on 26 March 1923.

- The entirely inappropriate and irrevocable intrusion of the Court – and especially the lay Magistrates' Court –into the private realm of the family was intrinsically undesirable; it would introduce discord, and be irreversible.

- The issues which would cause disagreement between parents would not be open to resolution through clear legal principles: they were not *justiciable*. Courts were concerned with the definite ascertainment of the parties' rights, and parental disputes would be decided, not on the 'rights' of either party, but merely around their opinions, such as the choice of school or religion, and according to the discretion of the judge (or magistrates).

To expect the judiciary to adjudicate on matters of trivial domesticity was preposterous and an abuse of their elevated position, and would require an expansion of resources and funding, and a commensurate increase in the numbers of judges and lawyers. A further objection was that public authorities would not be able to exercise their legal duties if they did not know to which parent they were to defer. It is difficult to imagine from our perspective today that there was ever such a time when family quarrels were not considered susceptible to resolution through litigation, or to exploitation by lawyers. But feminism was on a roll and ruthlessly trampled over any rational warnings raised to exercise caution: the intrusion of the State into the home was precisely what these iconoclasts wanted.

At the same time the feminists succeeded in politicising the family, and turned it into an election issue. In the 1925 election campaign the Conservatives – with some prescience – accused Labour of wanting to destroy the family and take children from their mothers to be made the property of the State. On 24th January 1924 the formation of a Labour Government, which had campaigned as the women's party, produced what NUSEC believed was a parliamentary majority for parental equality. [6] The compromise which Ramsay MacDonald's Government thrashed out with NUSEC, the Guardianship of Infants Act 1925, gave married women 'like powers' (i.e. equal to their husbands) over their legitimate children to apply to the Court over any issue regarding them, allowing them to apply to a court of summary jurisdiction to seek that authority for the cost of a two shilling application. In this respect a mother's rights now exceeded those of her husband, who could apply only through the vastly more costly High Court.

The Act also gave mothers equal rights to appoint guardians after their deaths, and the right to receive maintenance from fathers. It did not, however, make mothers 'joint guardians' and the father remained sole legal guardian of his legitimate children. Still, in 1925, few women had the economic autonomy to take on the obligations demanded by guardianship; lawmakers were well aware that giving equal legal rights to parents would force the courts to arrogate parental authority in order to resolve disputes. This they viewed as courting disaster.

The legislation also allowed cases to be heard in the Magistrates' Courts, opening up family law to the working classes and providing lawyers with a huge new untapped market. Parents were encouraged to take disputes to the courts and the number of cases increased; it thus became customary and acceptable for issues concerning the

[6] NUSEC Annual Report 1924

parenting of children to be resolved in the courts rather than by parents acting together in cooperation. Surrendering parental authority to the courts was no longer seen as an indicator of parental failure. The feared disaster began to unfold.

It is remarkable that the Bill was an agreement made between the Home Office and the feminist groups – from whom the Ministers and their officials had successfully concealed the compromised nature of the Bill – and was only perfunctorily debated in Parliament.[7]

The Act's most significant and historical innovation was the introduction, in Section 1, of the principle that the child's welfare should be the Court's 'first and paramount' consideration,

> *Where in any proceedings before any court… the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration…*

The argument for equality in the family built upon the principle that men and women were equal under the law, had equal voting rights and equal property rights; a pledge to remove all existing legal inequalities had been given by Lloyd George and Bonar Law in November 1918. An equally powerful argument was that the law should reflect the common everyday practice within normal families.

It wasn't until 1965 that further pressure was brought to give mothers greater equality in parental legal authority. Dame Joan Vickers, Conservative MP for Plymouth, Devonport, brought a bill to eliminate the continuing perceived discrimination against women. The Guardianship Act 1973 finally gave mothers the same rights and authority as fathers; either parent could now make an application to the courts without reference to the other, and expect the courts to resolve the matter. Slowly but surely parental authority was undermined, taken away from parents, and arrogated by the courts; simultaneously parents' ability to work together was subverted. Once parents embark on litigation in disputed cases they can no longer make even the most basic decisions regarding their children without judicial approval. Ready access to the legal process to resolve disagreements which would have posed no difficulty to their grandparents infantilises parents and renders them unable to care for their children without governmental assistance.

In the seminal case of J v C [1970] AC 668 the Lords interpreted the law to mean that it was consideration of the child's welfare which should guide the course the case should take; in effect, that it should be the Court's *only* consideration. The consequence of this was to remove from the Court's consideration the behaviour of either parent, the wishes of either parent, or their ability to care for their children. This ruling thus undid the compromise of the 1925 Act which had ensured that the child's welfare should be the *paramount* consideration, but not the *only* one. This progression owed more to the fight by women for equal authority over their children than to any principles of child protection.

[7] Lord Raglan, Hansard, 17 February 1926

0.2.2. The Children Act 1989

1991 saw implementation of the Children Act 1989 which introduced without preamble or explanation this extraordinary clause:[8]

> *The rule of law that a father is the natural guardian of his legitimate child is abolished.*

This was the measure, demanded by the feminist groups in the 1920s, which the Guardianship of Infants Act had failed to deliver. The Act was the product of the Law Commission, a quango introduced by Harold Wilson in 1965, and a relic of old Labour, untouched by the Thatcher reforms.

The Law Commissioner responsible for drafting the Act was Brenda Hoggett. She had never practised law and had been an academic at Manchester University before becoming the first woman appointed to the Law Commission, on which she served for nine years between 1984 and 1995, declaring that she was 'a feminist of the kind who would like to see changes in the way society is organised'. She seems to have owed her position to her fellow Commissioner, Nigel Farrand, whom she later married a mere nine days after divorcing her first husband. In a collection of essays[9] published in 1980 she had written,

> *Family Law no longer makes any attempt to buttress the stability of marriage or any other union... Logically we have already reached a point at which, rather than discussing which remedies should be extended to the unmarried, we should now be considering whether the legal institution of marriage continues to serve any useful purpose.*

Hoggett was the first Law Commissioner to introduce her personal take on hugely controversial social issues into statute law. A politically savvy feminist who embraced the usual collection of fashionable causes (gay adoption, legally recognised gay partnerships and improved legal rights for heterosexual cohabitants), she used her position as a political soap-box from which to broadcast her contentious views, making her 'the most ideological, politically correct judge ever to have been appointed to the highest court in the jurisdiction'.[10] She attempted to turn the Law Commission, and thence the law itself, into an instrument of social change.

Her inexperience led to legislation which was strong on ideology but weak on practicality, with vital concepts undefined and thus at the mercy of judges' discretion.

It will surprise no one who has been through the strange, paradoxical world of the Family Courts that Hoggett and her cronies likened their little clique to the Mad Hatter's tea party. Farrand was Tweedledum with Trevor Aldridge as Tweedledee; the chairman, Sir Roy Beldam, was the March Hare. Hoggett saw herself as Alice, but she seems better suited to the role of the Hatter himself. Today, Hoggett, now Baroness Hale, has a caricature of the group hanging in her home. You really couldn't make it up.

[8] Children Act 1989, 2 (4)
[9] Eekalaar, J.M., and Kats, S.N., eds., *Ends And Means: The Utility Of Marriage As A Legal Institution*, 1980
[10] Melanie Phillips, *The Judicial Sister*, Daily Mail, 13 November 2003

Discarding the centuries-old principle of natural guardianship – based on an erroneous reading of the existing law – was Hoggett's greatest innovation. It raised a mother's authority above that of a father and the State's over both; removing the word 'first' from the legislation now confirmed 'welfare' as the Court's *only* consideration. Explanation and justification for the otherwise baffling abolition of a principle which had endured for centuries is provided in the Law Commission paper No. 172.[11]

Some of the presumptions made by the Law Commission were simply wrong: the idea that a mother was 'in no better position than a stranger' was manifestly nonsense. While the father was alive a mother had no need of guardianship; if he died she could become her child's guardian. A woman was only legal guardian to her illegitimate children because they had no legal father to act as guardian, unless she married. Guardianship was not merely a legal nicety; it entailed real obligations and duties which, at a time when few women had any financial independence, an economically inactive woman would simply not have been able to fulfil: there was no welfare state to fall back on or to take on the paternal role as there is today.

Having demolished a centuries-old system on a false understanding of how it worked, Hoggett replaced it with the new concept of 'Parental Responsibility'. It is ironic that having rejected guardianship on the grounds that it made mothers' rights subservient to those of fathers she then replaced this system with one in which a father's Parental Responsibility was dependent upon his relationship with the mother. It is clear that this was not the replacement of an arrangement 'archaic and confusing', but the introduction of a specifically feminist legislation. Unappreciated by the authors of Law Commission 172 was just how much the very basis of fatherhood depended upon the 'archaic' concept of guardianship.

The Child Support Act 1991 further enfeebled the sacrament of marriage; matrimonial status became entirely irrelevant and the term 'absent' was fraudulently introduced to describe a father deliberately excluded from his children's lives. A father's funds could now be appropriated by the State regardless of any immoral or unethical behaviour by the mother of his children, the level of payment being determined by his income rather than by the need of the child. 'Welfare' now came to have a predominantly financial meaning and the 'welfare' demanded by the Children Act could be enforced through the compulsory payment of child support.

0.2.3. Fallacies

By avoiding a definition of the welfare principle within the Children Act the legislators made their task simpler, but such imprecision has led to inconsistency in its employment, both between and within cases. Judges are forced to decide cases according to their discretion which is erratic and capricious. Any variability in the way cases are treated is excused with the mantra, 'every child is different'. This is nonsense; if it were true then there could be no law of general application, but all children have the same needs and the same rights, and the law must apply to each of them equally.

[11] Law Commission paper No. 172, *Family Law, Review of Child Law Guardianship and Custody*, 25 July 1988

No consideration was given any longer in the Children Act to the potential impact on a child of the resident parent's behaviour, and there was no adequate provision for enforcing a Contact Order once it was breached. The effect was that the welfare of the child became entirely subordinate to that of his resident parent – usually the mother; the child's welfare was assumed to depend on the resident parent's, or more accurately, on her happiness, so satisfying her demands came to be the common way in which the courts interpreted this prerequisite.

Helen Reece of University College, London represents the welfare principle as a covert way of giving mothers equal authority to fathers by subordinating both of their interests to those of their children.[12] This only became overt under the 1989 Act. This is a remarkable insight, and a persuasive explanation of the abuse of the principle since. We would go further, and suggest that since the courts began to equate a child's welfare with the mother's wishes, equality was not what they were after, but sovereignty, and even retribution for centuries of perceived unfairness and subjugation. Feminist campaigners had wanted the child's welfare to be the Court's *only* consideration, presumably on the understanding that they would be the arbiters of what was in children's best interests. This 'welfare principle' rapidly took on a life of its own, and enabled courts to intrude further than ever before into family life, making value judgements about parents' ability to parent and giving judges latitude to decide cases according to their prejudices (or 'discretion', if you prefer) rather than upon recognised legal principles. It is not the children's interests which are enhanced but those of the State, pretending to act in the best interests of the child.

By concentrating solely on the interests of one individual the legislation had the effect of pitting the child against his family. Whereas the family had been viewed as a whole, and the first and best protection of a child, under the 1989 Act it became a threat to the child, which must be neutralised by the intervention of the courts and social services. Thus do the courts justify their invasion of private lives and their arrogation to themselves of parents' rights to make decisions for their children.

The 'welfare principle' enables the transfer of parental authority to the State from the parent who has done nothing wrong and hands unlimited power over children to government employees. The ability to remove children from their parents and reallocate them through adoption to other, more politically acceptable adults is the most extreme example of this.

Consider the arguments in the book *Beyond the Best Interests of the Child* by Joseph Goldstein, Anna Freud and Albert Solnit,[13] which represents the blending of Freudian ideas with Marxism; the authors state, 'the non-custodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits'. In a later epilogue to the book the authors clarified, 'We reasoned, always from the child's point of view, that custodial parents, not courts or noncustodial parents, should retain the right to determine

[12] Helen Reece, *Subverting the stigmatization Argument*, Journal of Law and Society, Vol. 23, No. 4, December 1996

[13] Joseph Goldstein, Anna Freud & Albert Solnit, *Beyond the Best Interests of the Child*, Simon and Schuster, December 1973

when and if it is desirable to arrange visits'; such extreme views are trendy, political and legalistic, not based on principles of child development or welfare: it is the industry which loses out if they are not implemented, not families or children. Following this advice will likely result in a child losing one or other parent entirely. The motive behind such thinking seems often to be the elimination of conflict, but a responsible system would not seek to accomplish that through a measure so devastating to the very children it is tasked with protecting.

Paying lip-service to feminism is part of the explanation, but the real reason has more to do with power and money: financial and custody gains for the mother, and a lucrative business for the lawyers, children's guardians, social workers, child psychiatrists and psychologists, child support enforcement officers and other camp-followers of the divorce industrial complex.[14] They say they have acted 'in the best interests of the child'; but in reality the only interests they serve are their own.

The 'best interests of the child' is merely a label stuck on to an intervention or court order retrospectively; by definition all decisions relating to a child must be made in its best interests because to do otherwise would simply be unlawful. Whatever decision is made is therefore 'in the child's best interests' irrespective of the outcome of the decision, of the facts and evidence in the case or of current research and academic opinion.

The claim that the Family Courts make decisions which are 'in the best interests of the children' is, according to Matt O'Connor, founder of Fathers 4 Justice, 'the most fraudulent claim ever deployed in the history of British justice'. The welfare principle is the sacred cow in child law; it allows so broad and flexible a discretion on the part of judges and has become so overriding that it regularly comes into conflict with the human rights of the other parties, and even of the child himself. But because it is *paramount*, no other factor need even be considered. The invocation of the principle allows the courts to ignore anyone else's rights absolutely – including those of other children of the family – and to ride rough-shod over them without the prerequisite to balance them or take them into account. They need consider neither facts nor evidence, because whatever they do will always, inevitably and indisputably, be 'in the best interests of the child'.

0.3. The Primary Carer

> *[There is] a rebuttable presumption of fact that the best interests of a baby are best served by being with its mother.*
>
> Lord Donaldson[15]

[14] A pejorative term echoing the 'military industrial complex' and used by American campaigner Dr Stephen Baskerville

[15] Lord Donaldson MR, Re D (A Minor) (Residence Order) [1992] 2 FLR 332, 336. CA

Perhaps the leading obstacle between a father and his children is the doctrine of the 'primary carer'. This is the second of the two overwhelming principles which dominate family proceedings: the iniquitous idea that a child only ever needs one parent.

This ideology demands that one parent be regarded as the primary carer and therefore as superior and essential while the other is seen as secondary and therefore inferior and optional. It guarantees that parents cannot be treated as equals in the Family Courts, and that outcomes can never be even-handed. The primary carer ideology is why the Court cannot take it for granted that your child needs a relationship with you, and why you have to argue your case. In a key speech on relocation delivered in 2010 at the Metropolitan University[16] senior Family Court judge Lord Justice Thorpe quoted Joseph Jackson QC,

> *An order awarding custody jointly to both spouses should not be made, save in exceptional circumstances, as in the event of disputes arising over questions relating to the child the matter has then to be referred back to the court.*

Thorpe approved,

> *I share that analysis. It stares out from the first sentence of the passage that I have cited above to the effect that on divorce a child, instead of being in the joint custody of both parents must of necessity be in the custody of a single parent. I emphasise those words 'of necessity'.*

To some degree the avoidance of joint custody is a purely practical measure to prevent deadlock in the dispute. Let us quote Lord Askwith's justification of the primacy of fathers again,[17]

> *One man alone must dictate the course and prescribe the speed. Divided counsels in bad weather would make for ship-wreck, even though both parties aspired to save the ship.* [We] *hold no brief against equality in status between man and woman. It is on practical grounds alone that the proposal is objectionable.*

Times change, however; Lord Askwith was writing in 1923, and Thorpe describes a view current in 1970. Today we have an urgent need for a legislation which allows for a wide variety of parenting arrangements and divisions of responsibility; one which allows for the emergence of 'house-husbands', for the growing involvement of fathers in traditionally female parenting roles and for a world in which women's position in the workplace is equal to that of men.

The Family Courts are willing to contradict their own principles when it suits; in November 2010 a case was reported in which two sets of grandparents argued over the residence of two girls. The judge, Mrs Justice Hogg, ordered that they remain with the couple with whom they had been living, referring to them as their 'primary carers'. Thus while a child can only have one primary carer if their parents are in dispute, when the dispute involves grandparents a child may be permitted two. A few days later a case involving artificial insemination of a lesbian mother by a gay father proved the same point. The

[16] Lord Justice Thorpe, *Relocation: the search for common principles*, speech delivered to the London Metropolitan University, 30 June 2010

[17] Lord Askwith, *Report from the Joint Committee of Lords and Commons to consider the Guardianship of Infants Bill given a second reading on 26 March 1923*

lesbian mother and her partner were regarded as the 'primary carers', though happily in this case the Court saw sense and awarded a Shared Residence Order ensuring the father spent equal time with the children.

The customary post-separation solution in which the child typically sees the father only for a few hours every couple of weeks is based on the belief that infants have only one primary attachment. The growing body of research challenging this has not, alas, been matched by legislative or judicial progress. There is little reason to believe that fathers cannot care for children and infants just as well as mothers, though parenting styles differ – and both mothers and fathers may need appropriate support. Shared parenting is not about men replacing mothers, but about children being permitted to maintain a relationship with both parents following separation.

The prejudice against fathers as parents and carers can be traced back to the work on ethological attachment theory done by Professor John Bowlby[18] in the 1940s, which has now largely been discredited, though it is still cited by CAFCASS. His theories of 'ethological attachment' and 'maternal deprivation', or, as it is often known, 'the tender years doctrine', are used to justify giving the custodial or resident parent dominant authority and the implementation of Contact Orders which impose a limit on contact of only a few hours every couple of weeks for the other parent, restrict bonding, and make the continuance of healthy family relationships impossible.

For Bowlby the father is of significance only indirectly as a support to the mother; he has no direct emotional significance to the infant. This belief derived from Freudian psychodynamic theory in which children were incapable of forming more than one significant attachment: having more than one carer would interfere with that primary attachment and weaken it. Bowlby believed that the attachment between mothers and infants could not be broken in the first few years without causing serious, permanent damage to the child's intellectual, social and emotional development. This hypothesis was derived from studies on children brought up during the 1930s and 40s in institutions and ignored entirely the lack of stimulation received by these children.[19] Tragically such beliefs have had an enormous impact on fathers seeking over-night contact with their children, or any degree of substantial contact with very young children.

Bowlby's work was originally inspired by the behaviour of goslings which behave in such a way as to keep the mother nearby: a clear survival or ethologic behaviour. There was a further political dimension to Bowlby's work which stemmed from the desire of the post-war Government to remove women from the workplace and return them to the home in order to create jobs for men returning from war. The father's role as financial provider was emphasised to the exclusion of his role as parent.

Bowlby's theories have since been challenged; Greenberg and Norris[20] showed that fathers bond with their children soon after birth and

[18] Bowlby, J., *Attachment and loss: Attachment (Vol. 1).* New York: Basic, 1969

[19] Goldfarb W., *The effects of early institutional care on adult personality*, 1943; Spitz R.A. and Wolf K.M., *Anaclitic Depression, Psychoanalytic study of the Child*,1946

[20] Greenberg & Morris, *Engrossment: The newborn's impact upon the Father*, 1974

Newson argued (1974)[21] that maternal skills are not instinctive but are learned through observation and practice. Kelly and Lamb[22] reported that 'considerable evidence now exists... that documents that most infants form meaningful attachments to both of their parents at roughly the same age (6 to 7 months). This is true even though many fathers in our culture spend less time with their infants than mothers do'.[23] They also observed, 'The preference for the primary caretaker appears to diminish with age, and by 18 months, this preference often has disappeared'.[24]

> *Although much has been made of research showing that mothers and fathers have distinctive styles of interaction with their infants, the differences are actually quite small and do not appear to be formatively significant... The benefits of maintaining contact with both parents exceed any special need for relationships with male or female parents.*[25]

Kelly and Lamb concluded,

> *If the parents lived together prior to separation, ... the central challenge is to maintain both infant-parent attachments after separation ... when parents have never lived together, and the infant has had no opportunity to become attached to one of the parents, as is common while paternity is being established legally, special efforts are needed to foster the development of attachment relationships.*

Schaffer and Emerson[26] showed babies respond to those who act sensitively with them, and can form multiple attachments, becoming as attached to their fathers as they are to their mothers. The sensitive parent sees things from the child's perspective, interprets the signals it makes, responds to its needs and is cooperative and accessible. The insensitive parent interacts in terms of their own wishes, needs and moods. Babies do not attach securely to insensitive mothers and become anxious. Where fathers are the parent responding most sensitively to the child, attachment to the father can be stronger.

Parke and O'Leary (1976), observing new parents in a maternity ward, found fathers to be interested and confident in interacting with their infants, and no less sensitive than the mothers. Kotelchuck[27] showed that some 12-month-old infants are more attached to their fathers than to their mothers. This research shows parenting to be a skill which fathers can acquire equally, given the necessary opportunity and motivation.

In *Maternal Deprivation Reassessed*,[28] Sir Michael Rutter repudiated Bowlby's research, showing the importance of a child's relationships with other people than his mother, and contradicting the assertion that maternal deprivation is damaging. He disentangled the various

[21] Newson, J., *Towards a theory of infant understanding*, Bulletin of British Psychological Society, 1974
[22] Joan B Kelly, Michael E Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, Family and Conciliation courts Review; Los Angeles; Jul 2000; Volume: 38 Issue: 3 : 297-311, Sage Publications
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Schaffer, H. R., & Emerson, P. E., *The development of social attachments in infancy*, Monographs for the Society for Research in Child Development, 29 (3, Serial No. 94), 1964
[27] Kotelchuck M., *The infant's relationship to his father*, 1976
[28] Rutter M., *Maternal Deprivation reassessed*, 1981

kinds of retardation suffered by children brought up in institutions. The implication of this is that court-ordered contact with a father is not harmful to the child.[29] Nevertheless, the prejudice remains, and courts are often loath to separate children from their mothers for the purposes of contact, or in order to punish contempt.

Attachment is a two-way process: babies respond to their parents' attention, but parents also are influenced by their babies, and interact less with sick or premature babies or with babies with disabilities such as visual loss. Parents whose own childhoods were lacking in affection will interact less, as will stressed or depressed parents. Some mothers see their babies as someone who will give them unconditional love and won't respond to the baby's needs, imposing unreasonable demands and unsuitable routines.

The evidence further shows that children who are deprived of meaningful relationships with one of their parents are at greater risk psychosocially, even when they are able to maintain relationships with the other parent. Stated differently, there is substantial evidence that children are more likely to attain their psychological potential when they are able to develop and maintain meaningful relationships with both parents, whether they live together or not.

The consequence of the tender years doctrine and the primary carer ideology is that the courts prefer to order children to remain with whichever parent has managed to be labelled 'resident' and the other parent thus becomes increasingly marginalised. The only real way to prevent this is for the Court to order shared residence. The habitual view of shared parenting at the time the Children Act 1989 was introduced was that it was not a practicable arrangement, that regular contact with the non-resident parent (read 'father') wasn't necessarily beneficial, that stability was equated with substantial loss of contact with the non-resident parent, that shared parenting could only work where there was no need for court intervention, and that court-ordered shared-parenting cannot work.

We shall counter these arguments in Chapter 1.

[29] See also Professor Sir Michael Rutter, *Clinical implications of attachment concepts – retrospect and prospect*, Journal of Child Psychology and Psychiatry, May 1995

0.4. The Balance of Probability

Acts of domestic violence and child abuse are rarely perpetrated in public, which means that corroborative evidence is seldom available. The Court, however, is obliged to 'prefer the evidence of one party over the other' and must make its decision, usually at a finding of fact hearing. If the accuser can appear faltering of voice and close to tears while the accused is angry at the allegations made, it will be apparent to the Court who is the victim and who the aggressor, regardless of the facts. In the Family Courts the maker of a false allegation only has to substantiate it to the civil court 'balance of probabilities' standard as opposed to the criminal law 'beyond all reasonable doubt' standard. Thus whoever is the most convincing in court will be favoured, and the experienced and eloquent barrister will have the advantage over the intimidated and nervous Litigant-in-Person. So instrumental and yet easily exploited is this principle that

it is worth discussing in some detail. It is defined in Re H and Others[30]:

> *The balance of probability standard means that a court is satisfied an event occurred if the Court considers that on the evidence the account of the event was more likely than not.*

Lord Nicholls further refined the balance of probability standard by saying that the more serious an allegation is, the less likely is it that the event happened and the stronger therefore must be the evidence presented before the Court can decide that the allegation has been established on the balance of probability. While this may appeal to mathematicians, whether or not an alleged event occurred is a fact the Court must address and is not influenced by the probability of its happening. A positive effect of the principle was that as allegations became more serious, so the courts demanded stronger evidence and the standard of proof required approached the beyond reasonable doubt standard, thus protecting the victims of false allegations. However, there were also two negative effects. The first was that children who were the victims of serious abuse which cannot adequately be proved were not protected; Lord Lloyd expressed this concern in the same case,

> *It would be a bizarre result if the more serious the anticipated injury, whether physical or sexual, the more difficult it became for the local authority to satisfy the initial burden of proof, and thereby ultimately, if the welfare test is satisfied, secure protection for the child.*

Secondly, judges were assuming that if they could not prove an allegation absolutely false the standard obliged them to proceed as though the allegation were true. Thus many children were losing parents who posed no threat to them. A further consequence of having two different standards of proof is that a parent can be tried in the criminal court and be found not guilty but still effectively be tried again in the Family Court where there is no need to prove allegations, and where the judge may be less willing to dismiss them; the proceedings will then continue on the presumption that the allegation against him is true. In Re B [2008][31] Lord Hoffman explained the courts' approach in terms of binomial theory,

> *If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.*
>
> *In civil proceedings the standard of proof is stated to be 'on the balance of probabilities'. Expressed mathematically this is P > 0.5. If a court were to find on the evidence that P = 0.5 (i.e. that the occurrence of the event was as likely as not) then*

[30] Re H and Others (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563

[31] Re B (Children) [2008] UKHL 35; [2008] 2 FLR 141

the standard would not be met, as the respondent to the allegation that is sought to be proved is always entitled to the benefit of the doubt.

Thus, it is clear that in all civil proceedings P cannot be set higher than a scintilla above 0.5.

Some had feared that a third standard of 'real possibility' (P > 0) would be introduced into family law to further lower the threshold for state intervention. Baroness Hale sought to resolve the confusion, rejected the escalating standard of proof and confirmed the 'binary' standard, emphasising that Family Court proceedings are not carried out in order to punish anyone but in order to protect a child, 'the consequences for the child of getting it wrong are equally serious either way.'

My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.

To allow the courts to make decisions about the allocation of Parental Responsibility for children on the basis of unproven allegations and unsubstantiated suspicions would be to deny them their essential role in protecting both children and families from the intervention of the state, no matter how well meaning that intervention may be.

Parents' groups were obviously relieved that an even lower standard of proof would not be introduced to allow easier state intervention based upon 'unproven allegations and unsubstantiated suspicions', but many would argue that this is precisely the standard which applies in the Family Courts: the standard is not sufficiently high to prevent children losing a parent or being taken into care when neither is justified. Family judges predictably resist the transfer of allegations to the criminal courts: most of them wouldn't stand up. False allegations of abuse are made disproportionately, almost exclusively, in custody cases for the simple reason that their purpose (and effect) is to secure custody. The courts are not, as they claim, erring on the side of caution but on the side of danger: it is the presence of a father which most protects a child from abuse. Tragically, this is a nettle the courts are unwilling to grasp.

The controversial Lord Justice Mostyn (who as a successful divorce barrister had earned the name Mr Pay-Out, winning colossal awards for ex-wives) sought to reduce the degree of uncertainty in fact finding through his judgement in AA v NA & Ors.[32] The burden of proof, he said, must be on the party making the allegation. Either an allegation is proved or it is not; to find that an event is as likely as not to have happened is not the same as a finding that an event is more likely than not to have happened: the probability must be greater than

[32] AA v NA & Ors [2010] EWHC 1282

0.5, even if only by a scintilla. The father had made over 80 allegations against the mother; Mostyn said,

> *Many of these were wholly trivial, unkind and unnecessary and were designed to destabilise her. They were all found to be false, by which the District Judge surely meant that they had not been proved to the requisite standard. For none of these was P > 0.5. It might be said that there is no difference between setting them aside and leaving the findings intact as in each case the charges simply remain unproven. But given the binary system of fact-finding explained by Lord Hoffmann the effect of the judgment is to return for each of these allegations a value of zero, and a finding that they did not happen.*

Thus if a court finds that an event is as likely to have happened as not (P = 0.5), it must conclude that it did not happen (P = 0). The force of Mostyn's decision is to reject the passive 'not proven' finding and to insist on the active 'did not happen'. This certainly would be preferable to the unsatisfactory convention in which unproven allegations continue to hang around cases, unjustly influencing outcomes. But this approach is not without its own problems; if the Court adopts the 'did not happen' finding, should it not then make a finding that the party making the allegation has lied and has thus harmed, or sought to harm, the child? If, however, finding of fact hearings cannot produce the 'did not happen' result, what is their purpose, and should they take place at all?

Mostyn's position is difficult, even contradictory, and it is confusions like this which force fathers' groups to argue that cases in which serious allegations are raised should be transferred to the criminal court. They want allegations to be made on oath and for there to be charges of perjury or attempting to pervert the course of justice where allegations are found to be false. They also want serious allegations to be rejected and to have no influence on a case unless they can be proved beyond reasonable doubt. The balance of probability standard is a big bugbear for fathers' groups, but it must be remembered it is a standard which has to be applied to each individual case: courts should not be making decisions based on what an individual thinks is generally likely. This is what concerns fathers, because the popular perception of probabilities surrounding matters such as child abuse is so distorted.

0.5. The Devil's Labyrinth

The Family Courts represent an unstructured game of Russian Roulette: you might be lucky, you might not. Litigants are at the mercy of the judges' discretion and a specific outcome cannot be predicted. Family litigation is based upon what the litigants say in court or write in their position statements, and not upon any evidence which can be proved through facts: it is no more than a war of words fought on paper.

You are reliant therefore not on the Court's forensic ability to analyse evidence but on the judge's gut instinct. Unable to weigh the evidence the judge will 'form an opinion' of the parties, and decisions are more

likely to be based on crude social stereotypes because that is less demanding than having to scrutinise each case carefully and assess it on its merits.

The courts are stretched almost to breaking point under the weight of cases, cuts in funding, loss of personnel and inefficiency. Levels of delay are rising inexorably.

Family Court apologists blame escalating hostility between parents on the parents themselves, but it is only partially our fault. The fault also lies in an adversarial process which can function in no other way than by pitting litigants against each other as opponents, and then refuses to take responsibility for the outcome. Users of the courts need to feel instead that their cases are dealt with sensitively by professionals who understand their difficulties, not as if they have just walked into a gladiatorial arena in which their skirmishes provide vulgar entertainment.

Your strategy must be to remain calm, be yourself, and tell the truth. If you are consistently truthful you will find it easier and you will not trip yourself up. If your opponent decides to tell a series of lies in Court that is their risk and they may come to grief. If an untrue allegation is made against you, you must challenge it, and explain how you know it to be untrue, otherwise it will be accepted into the record. If you come across as emotional, or more emotional than the other party, this will be seen as weakness and will count against you, it will also make it more difficult for you to concentrate on what you need to say, and you will find yourself regretting afterwards that you didn't make your case as well as you might have done.

The Family Courts don't work well for anyone, regardless of their gender. The greatest shortcomings are the failure to keep records – resulting in a lack of evidence on which to base judgements; the inability to tell truth from fiction; incompetence, particularly where identifying risk is concerned; and the overriding secrecy which prevents these defects being uncovered or eradicated. CAFCASS workers are poorly trained, lazy, introduce enormous delay, and adopt off-the-shelf, one-size-fits-all solutions to disputes. Good fathers receive minimum contact with their children, while bad, violent or abusive fathers achieve similar levels, putting all children at risk. This is the Devil's Labyrinth into which you have blundered, and it is the purpose of this work to offer you a thread to show you the way out.

0.6. This e-Book

The first version of this work came about as the brainchild of Jenny Bostock, the administrator of the civil rights group Fathers 4 Justice (F4J), who suggested providing members with a fact-sheet answering frequently asked questions. I had already prepared some fact-sheets on issues such as changing a child's name and child abduction. In addition I had written pieces on CAFCASS and on the Government's proposals for child support reform and for increased openness.

This was the first such guide to target information specifically at litigants in person. All other guides to family law assumed that as the litigant you would have a solicitor representing you. Increasingly, that option has become rarer. Inevitably there will come a point in most

protracted cases where you simply run out of money and are forced to go it alone.

If you are wise you will ditch your solicitor long before reaching that point, because you have realised that using a solicitor is not the best option anyway. If you are receiving legal aid you will find that those funds too will be exhausted before you reach the end of your quest. The Government is introducing measures to reduce the huge legal aid bill, not least because of the self-seeking abuse of the system by solicitors, and this will make it more difficult for parents to access public funding or to explore all the routes necessary to pursue a case.

No book, no advisor, can give you entirely dependable guidance which will guarantee success in the Family Courts. Outcomes are fluid and unpredictable, with different judges making different decisions on the same evidence. The difference between the Family Courts and other courts is not justice but finality: a decision elsewhere in the Courts Service is final, regardless of whether or not it is just; a decision in the Family Courts is rarely final, and parties may dispute it endlessly.

The very fact that a decision made in the Magistrates' Court can be overturned in the County Court, modified in the High Court, reversed in the Court of Appeal and quashed in the Supreme Court (formerly the House of Lords) is an indication that there are no certain principles or guidelines within family law and a Family Court judge has enormous discretion.

Between these extremes lies a wide continuum, and the more conflicted cases will wander back and forth here with little prospect of decisive resolution. Decisions can be appealed, but the rules are restrictive, and even if the appeal judges would have made a different decision in the same situation, a decision can only be overturned if the judge in the lower court 'misdirected himself in law'.

So this Handbook will not necessarily provide you with all the information you will need. Family Law is not set in stone; it shifts like the sands of the desert, blown by new legislation and new precedents, and the path that one parent finds through the Devil's Labyrinth may be closed to another.

The guidance provided here has been effective in many cases, is the best I have been able to glean from many sources, and is well intentioned, but it won't work in all cases. Nevertheless, this e-Book contains much of the information you will need to know in order to take your case to Court and win. It is arranged in the order in which I think you are most likely to need it, together with the legislation and details of cases which set a precedent.

Many of these precedents have been set by family campaigners not necessarily to benefit their own cases, but to establish a better covenant for parents in the future. When you yourself benefit from them – for example, to allow McKenzie Friends the right of audience – pause a while to reflect on the self-sacrifice and years of litigation which have made them possible.

CHAPTER 1: SHARING PARENTING

The making of a joint Residence Order underlying the status of the parents as equally significant in the lives of the children would be likely to diminish rather than increase that conflict.[33]

1.1. Property of the State

The genuine commitment that marriage requires of both parties is based on a unique sexual bargain and family dynamic. The mother of a child requires the father of that child to commit himself to the duty of helping raise it for the duration of its childhood; only the biological father will be prepared to undertake that onerous burden; but the father will only commit himself if he is absolutely certain the child is his, for which he requires the mother to be faithful to him. And the child requires both its parents to raise it, because they form the two crucial and interlocking pieces of the jigsaw of that child's identity. If those pieces fall apart, the child's identity is in danger of fracturing too.[34]

At the heart of the Fathers 4 Justice campaign is the belief that children require the close involvement of both parents in their lives if they are to develop to their full potential, and that the only satisfactory arrangement following family breakdown is for parenting to be shared cooperatively between both parents.

[33] Ansell J in D v D [2001] 1 FLR 498

[34] Melanie Philips, *Yes, it's more difficult than you think, Dave*, The Spectator, 11 January 2010

We argue that parenting following divorce or separation can be managed: that the dog's breakfast the Family Courts make of it is not inexorable. It is our aim to help you resolve your differences with your former partner and overcome the obstacles thrown up by the divorce industrial complex.

The prevailing court practice in the UK and other English-speaking nations for arranging parenting following divorce and separation is to award sole legal and physical custody to one parent while the other must settle for severely limited access or 'contact'. The word 'custody' has unfortunate connotations; you may have seen the videos on YouTube showing children being 'arrested' by police and social workers and dragged out of their homes in handcuffs in order to comply with a Court Order. 'Residence' is now the preferred term.

When these arrangements are broken by the 'custodial' parent the custom of the courts is non-intervention. At the same time the non-custodial parent is persecuted by a body of repressive and criminalising legislation concerning, for example, domestic violence, harassment and the enforced payment of child support, aimed at making him compliant with this state-sponsored abduction of his child.

In some European countries, but not in the UK, there has been an essentially symbolic move towards joint *legal* custody, whilst retaining sole *physical* custody. France introduced joint legal and physical custody legislation in 2002;[35] Italy in March 2006. Spain introduced shared parenting legislation in 2005, though family rights lobbyists dismiss it as inadequate. Belgium implemented legislation in September 2006 presumptive of 'bi-location' or 'alternating residence'; the Netherlands introduced a presumption of equal parenting in January 2009 with an incentive for parents to agree arrangements mutually. German parents are obliged to file shared parenting plans before they are granted access to the courts.

Australia also passed a largely cosmetic and ineffective shared parenting bill in 2006, though it may be repealed (see below). Various US states have passed similar legislation.

The UK lags far behind; despite sustained and high-profile lobbying for shared parenting the Labour government consistently refused to consider the issue and the recent Family Justice Review has recommended against it. Two private members bills on shared parenting are slowly working their way through Parliament. The consequence of this political failure has been catastrophic: an important November 2009 study[36] by the lawyers Mischcon de Reya showed that,

- 68% of parents admit to using their children as bargaining tools;
- 50% admit to putting their children through an intrusive court process;
- 49% admit to deliberately protracting the process to get the result they want;

[35] Information in this section comes from *Benefits of post-divorce shared parenting*, a presentation by Peter Tromp PhD, President of the Father Knowledge Centre Europe, and Chair of the Dutch Foundation for Children, Access and Equal Parenting at the International Conference on Family and Equality "Justice and Father's & Men's Dignity" on 2-4 January 2009 in Drama, Greece

[36] Press release issued by Mishcon de Reya, November 2009

- 20% admit to making the experience as unpleasant as possible for their partners.

It does not have to be like this. While in opposition the Conservative Party worked diligently to produce an alternative vision of family justice which it promised to enact if elected to power. In a joint statement with Fathers 4 Justice on 8th April 2010 Shadow Justice Minister Henry Bellingham committed the Conservatives to:

1. A new definition of cooperative parenting ensuring that parents know clearly what is expected of them before they enter the courts, denying them the option of prolonged litigation;

2. A legal presumption in favour of automatic shared parenting within a context of equal Parental Responsibility (no rights without responsibility);

3. Early intervention and mediation before couples see a solicitor, provided through Australian-style family justice 'hubs';

4. Enforceable Contact Orders and zero-tolerance of excuses, delay and false allegations, including the withdrawal of benefits from parents who unreasonably withhold access;

5. Granting grandparents the automatic right to make Section 8 applications without having to apply for leave;

6. CAFCASS to have minimum intervention in private law cases and to concentrate their role on public law cases and child protection issues;

7. A pro-active judiciary with more efficient handling of cases and greater judicial continuity;

8. An urgent and thorough review of family justice through wide consultation with interested groups leading to an interim report by the Autumn of 2010;

9. Reduction of the intolerable cost to the economy caused by family breakdown and prolonged litigation at taxpayers' expense;

10. An end to the ruinous destruction of children's aspirations and potential caused by family breakdown and conflict.

Following the Election the reality was very different. The Coalition released a sequence of unrelated initiatives which demonstrated a lack of coherence or integration and revealed very familiar prejudices and misconceptions. As discussed in the **Introduction**, the Family Justice Review Panel reported pitifully inadequately in March and will report more fully at the end of October, and reform of some sort will follow. We have no confidence that it will bring in the revolution in family justice which the country is crying out for.

Prime Minister David Cameron took cynical advantage of Father's Day 2011 to make an opportunistic attack on non-resident fathers in order to soften up the public for his Government's aggressive stance on child support defaulters,[37]

[37] David Cameron, *Dad's gift to me was his optimism*, Sunday Telegraph, 19th June 2011, http://www.telegraph.co.uk/news/politics/david-cameron/8584238/David-Cameron-Dads-gift-to-me-was-his-optimism.html

> *We need to make Britain a genuinely hostile place for fathers who go AWOL. It's high time runaway dads were stigmatised, and the full force of shame was heaped upon them. They should be looked at like drink drivers, people who are beyond the pale.*

Combined with Cameron's failure to honour his party's pre-Election commitments this prompted Matt O'Connor to camp outside Cameron's constituency home on hunger strike for a week. Cameron was forced to write a humiliating letter clarifying his position and exposing his Government's total lack of policies in the area of family justice reform.

The purpose of this chapter is to present the clear advantages of shared parenting; we then outline some of the arguments against and the principle barriers to successful post separation parenting, and explore how you can surmount them.

We shall look first at why cooperative shared parenting is so critical an aspiration following relationship breakdown. Since it is usually the father who is excluded, we present the arguments for involving fathers in their children's lives. We then counter some of the arguments of those opposed to shared parenting.

1.1.1. Definitions

There are many terms you will come across which can be confusing: shared parenting, shared residence, joint legal custody, etc. Shared parenting is an ideological ideal – the principle that parenting should be shared, more or less fairly, following parental separation. Shared residence is a legal status conferred by a Court Order. It gives the parent certain legal powers they would not otherwise have, the right to take their child out of the country for 28 days without the other parent's consent, for example. Otherwise its value is largely one of perception, and it confirms to a child that they really do live with the parent they see less often and he is not merely a visitor in their lives.

There is a distinction between joint legal custody, in which both parents are equally responsible for a child, even though one may have limited contact, and joint physical custody, where the child is permitted to spend a significant proportion of his life with each parent.

1.1.2. Disenfranchised mothers

If you are a mother there are fewer sources of support available to you than to fathers; we recommend that you contact the organisation **MATCH** (Mothers Apart from Their Children) or use the **Wikivorce**, **Mumsnet** and **Netmums** fora. Mothers experience many of the same issues men do in the Family Courts, including false allegations, parental alienation and abduction of their children abroad.

Although it is still overwhelmingly the mother to whom the courts award custody, a significant number of mothers are losing custody to fathers, though the courts cannot provide figures.[38] Whilst the growing number of Shared Residence Orders is to be celebrated, sole

[38] According to figures from the CSA only 5% of non-resident parents are mothers.

Residence Orders in favour of fathers only add to the problems for the children of family breakdown. Frequently fathers given sole residence behave as badly as mothers do, exploiting the power they are given to alienate children and exclude mothers, or to exert control by forcing mothers to remain in the court process.

Society applies a double standard to such cases; fathers are almost expected to lose their children after separation, but when it happens to mothers it is more unexpected and more shocking; they are assumed to have done something terrible and are shunned by former friends or work colleagues.

When the broadcaster Anne Robinson separated from her first husband, Charlie Wilson, 40 years ago he was given custody of their 3-year-old daughter Emma because of Robinson's alcoholism; she says, 'I was so ashamed of losing Emma I was stoic, and keeping it a secret was pretty bad. I lived with a dull ache.'[39]

After Penny Cross, the chairwoman of MATCH, got divorced her children were alienated against her; she hasn't seen them since, and even when they became adults they wanted nothing to do with her. When her eldest son died she wasn't allowed to attend his funeral, 'I do not think my children will come back ever… There is a secret sorrow, a bereavement cycle you go through.'[40]

We estimate that 1,000 children each week lose all or significant contact with a parent; a total of more than half a million over the course of the last Government. Don't let your own family become part of these statistics. Defend your family.

1.1.3. Disenfranchised fathers

If you are a father you will quickly learn that the courts do not consider a father can be a child's 'primary carer' or to be necessary as a consequence in his child's life. As a result many children lose all meaningful contact with their fathers – estimates range from 15% to 28%,[41] up to 40% within two years,[42] to as high as 60% overall.[43]

Apologists for the current state of the Family Courts point out that in the Victorian court it was mothers who were eliminated from their children's lives. This is true, **but more children now lose a father in 3 months than lost a mother in Victoria's entire 63 year reign**.

As we shall explore in **Chapter 3**, the Courts are dismissive of fathers' claims to be parents to their children. Equally they give little thought to the rights of children to have an involved father. Where children are born without the father's knowledge, the Courts like to keep it that way. Following a 2007 case in which the Court of Appeal allowed a mother to keep the birth of a child secret from the father and grandparents in order to allow adoption, parenting groups were

[39] Sian Griffiths, *Hidden heartache of the weekend mothers*, The Sunday Times, 7 October 2007, http://women.timesonline.co.uk/tol/life_and_style/women/families/article2602598.ece
[40] Ibid.

[41] Blackwell, A. and Dawes, F., *Non-Resident Parental Contact*, based on data from the National Statistics Omnibus Survey for the Department for Constitutional Affairs, October 2003.
[42] Bradshaw and Millar, 1991.
[43] Former President of the Family Division, Dame Elizabeth Butler-Sloss: the Paul Sieghart Memorial Lecture at the British Institute of Human Rights, King's College London, 3 April 2003 http://www.dca.gov.uk/judicial/speeches/dbs030403.htm

vociferous in their condemnation; Barrister Michael Cox of Fathers 4 Justice said,

> *This father is the victim of a wicked deceit in which the State has been complicit. It is now clear that the Government believes children have no entitlement to a relationship with their fathers and that children are the property of their mothers and of the State.*

What caused most outrage in equal parenting circles was Thorpe's blunt statement that the father's rights could not be violated as '**he has no rights**'. Fathers have pointed out that had the mother been willing to identify the father he would have been pursued mercilessly for child support.

The angriest response came from those adults who had themselves been brought up in ignorance of their fathers, and who have been unable to trace them, as Baby E will be unable to do. They have described a huge void in their lives, and life-long confusion about their identity. The donor-conceived David Gollancz writes from personal experience when he says that children brought up in deliberate ignorance of their 'story' are,[44]

> *flotsam: mere accidental concatenations of unaccountable desires and meaningless memories floating in the random currents of experience without context.*

Much of the blame for these attitudes must be laid at the door of the feminists, who would deny fathers any say at all in whether they see their children. Mary Becker[45] argued that as mothers invest more in child care and have greater empathy with children the courts should defer to their wishes. Martha Fineman[46] stated that the sole-custody model was the only one that ensured children's welfare because of the qualitative differences between the parenting offered by mothers and fathers. The evidence which we shall present below contradicts this.

Some campaigners lobby to deny a father the right to apply for shared residence altogether where a mother has offered what they consider 'reasonable' contact. Julia Brophy[47] contended that shared parenting disempowers women by continuing to impose pre-separation power relationships. Applications by fathers for continuing relationships with their children are perceived as attempts to exert control; but who is the more controlling, the parent who applies for shared residence or the one who responds with an application for sole residence?

[44] David Gollancz, *Time to stop lying*, The Guardian, 02 August 2007, http://www.guardian.co.uk/society/2007/aug/02/childrensservices.humanrights

[45] Becker, M., *Maternal feelings; Myth, taboo and child custody*, (1992). Review of Law and women's studies. 1;133-224.

[46] Fineman, M., *Dominant Discourse, professional language and legal change in child custody decision making.* (1988). Harvard Law Review, Vol 101, No. 4 p727-774

[47] Brophy, J., *Custody Law, Child Care and Inequality in Britain*, in C. Smart and S. Sevenhuijsen (eds) *Child Custody and the Politics of Gender*. (Routledge,1989).

1.2. Children Need Both Parents

1.2.1. Justifying fatherhood

It is beyond belief that we have to stand up in Court and defend a truth so obvious as that children need both of their parents, but we do.

The argument which follows is necessarily brief, but it should give you enough evidence and references to help you construct your case in Court for your continued involvement in your child's life.

1.2.2. Children need fathers

The damage caused by fatherlessness contradicts the liberal political consensus that fathers are an optional accessory, certainly not essential to a child's development and, if anything, disadvantageous or even harmful. If there is any detriment to bringing up a child without a father, the belief is that it can easily be assuaged through the welfare system and more munificent state hand-outs. Forcibly to remove a father, in the group mind of the political intelligentsia, cannot do harm, and so they are blind to the link between fatherlessness and its more destructive consequences.

Fathers are a nuisance, who won't go along with the group-think, who won't pay their child support as they are supposed to, who won't abandon their preposterous demands to be involved in the lives of their children. These demands are made out of love, but they are also made out of a sense of responsibility, because only a father can understand just how destructive his forced removal can be.

The relationship between a father and his child is a special one for which there is no substitute. Most fathers and children know this intuitively, but much recent research has provided confirmation. Children brought up with two parents enjoy an increased richness of care, a wider family of grand-parents, aunts and uncles, a network of community organisations such as synagogues, mosques and churches, and a richer and more complete personal history.

Outside the Family Courts fathers are sharing much more of the parenting load than hitherto. More fathers are their children's 'primary carers' or share significantly in the primary caring role.[48] A 2007 study by the Equal Opportunities Commission showed that mothers were looking after their children for 2 hours and 32 minutes each day while fathers were doing so for 2 hours and 16 minutes.[49] It is high time that decisions made in the courts reflected this reality.

Karen Woodall, who runs the Centre for Separated Families, thinks the belief that men are always the providers and women the carers is deep-seated within British culture and that we must reject these stereotypes before post-separation parenting can become fully shared,[50]

[48] Lewis C, *A man's place in the home: Fathers and families in the UK*, Joseph Rowntree Foundation, London, 2000
[49] Equal Opportunities Commission, *Completing the Revolution: The Leading Indicators*, London, 2007
[50] Lucy McDonald, *The children who have two homes*, The Independent, 28 September 2010

Part of the problem is that we're still clinging to the idea that a child without its mother is going to be damaged. We need to move beyond that. After separation children do best if both parents are involved. Many mothers who share parenting say they feel they're being judged for failing their children.

1.2.3. Single parenting

I am not saying every broken family produces dysfunctional children but I am saying that almost every dysfunctional child is the product of a broken family.

Lord Justice Coleridge[51]

Most single parents are mothers; fathers constitute only about 1 in 12 of single parents[52] and there is very little research available on them. What there is shows that children deprived of mothers do not exhibit the severe damage that children deprived of fathers do. Indeed the outcomes for children of single fathers do not differ substantially from those brought up in couple families: the sons of single fathers are less likely than the sons of single mothers to go to prison and their daughters are less likely to become teenage mothers. Adding a stepfather to the mix makes outcomes worse. The payment of child support makes no difference; it is the biological father's parenting and not his money which is critical.[53]

One of the most significant influences a father contributes is in the quality of his relationship with his child's mother. A mother who is loved and affirmed will be more responsive, affectionate and confident; her children will be more respectful of others and less anxious, withdrawn, or anti-social.[54] The presence of a father during pregnancy will reduce maternal stress and result in higher birth weights. Fathers help mothers keep the house clean and in good repair, care for the children, pay bills, take decisions; married mothers are more secure than unmarried mothers.[55]

Being a single parent is not the ball some people manifestly think it will be; it is difficult, hard work and unrewarding. It robs parents of a career and curtails their social life, and if they should fall ill, who is to take over? Lone parent households have 2 to 2.5 times the risk of remaining on persistently low incomes,[56,57] are 8 times as likely to be out of work compared with couple households,[58] and are 12 to 15 times

[51] Lord Justice Coleridge, keynote speech delivered to Resolution National Conference, *Family Life – Family Justice – Fairness*, 5 April 2008

[52] Office for National Statistics, *Social Trends 2009*, April 2009, http://www.statistics.gov.uk/downloads/theme_social/Social_Trends39/Social_Trends_39.pdf

[53] Cynthia C Harper & Sara S McLanahan (who is herself a single mother), *Father absence and youth incarceration*, American Sociological Association, San Francisco, 1998, summary here: http://www.tyc.state.tx.us/prevention/father.html

[54] Gable, S., Crnic, K., & Belsky, J. (1994). *Coparenting within the family system: Influences on children's development*. Family Relations, 43(4), 380-386

[55] Pleck, J.H., *Working Wives and Family Well-Being*, Beverly Hills, CA: Sage, 1984

[56] Ibid.

[57] *Households Below Average Income 1994/95-2000/01*, Department for Work and Pensions, London: The Stationery Office (2002).

[58] *Work and Worklessness among Households*, Office for National Statistics, London: The Stationery Office, Autumn 2001.

as likely to be receiving income support.[59, 60] Figures from the Department for Work and Pensions show that 40% of child poverty is attributable to low-earning single mothers.[61]

The UK has the highest proportion of children living in workless households in Europe;[62] in London half of all children are brought up by a single mother, 4 in 10 children live in poverty, teenage pregnancy rates are twice the national average, and the number of children in care is a third higher than the national average.[63] A study by Barnet council in London showed that a typical single mother and her three children could cost the taxpayer £5million over her lifetime.[64]

We accept, of course, that single mothers do not always have a choice. Some are widowed. Some are abandoned by their children's fathers. Some have good reasons for leaving. What we condemn are government tax and welfare policies and legislation which make single parenthood more attractive and more likely. We condemn, too, the 57% of single mothers in the UK who *choose* single parenthood as a lifestyle choice,[65] and those – feminists and others – who promote the elimination of fathers.

The problems of fatherlessness are circular: fatherless children beget fatherless children; in some 'families' there are now 3 generations of single mothers. The teenage pregnancy rate in the UK is the highest in the developed world and 4 times higher than the West European average.[66] Half of these pregnancies end in abortion;[67] In 2008 in England and Wales there were 41,325 conceptions amongst girls under the age of 18, of which 19,387 (47%) ended in abortion.[68] The UK has been dubbed the 'abortion capital of the world',[69] in which abortion has become just another method of birth control with one performed every 2.5 minutes: fewer than 1 abortion in 5 takes place within marriage.

1.2.4. Child safety

Contrary to the strident claims made by the more extreme gender feminists who have so heavily influenced government policy, children are actually much safer being brought up in a married household with

[59] Lyon N., Barnes M., & Sweiry D. (2006) *Families with children in Britain: Findings from the 2004 Families and Children Study (FACS)*, Department for Work and Pensions Research Report No 340.
[60] *Family Resources Survey*, Great Britain, 2000–01, Office for National Statistics, London: The Stationery Office, May 2002.
[61] *Mother/child poverty link 'exposed'*, 12 May 2008, http://www.inthenews.co.uk/money/news/finance/motherchild-poverty-linked-exposed-$1222308.htm
[62] Palmer G., Carr J., & Kenway P., 2005 *Monitoring poverty and social exclusion*, Joseph Rowntree Foundation, 2005.
[63] Iain Duncan Smith et al., *Breakthrough London: ending the costs of social breakdown*, the Centre for Social Justice, 14 April 2008, http://www.centreforsocialjustice.org.uk/client/downloads/breakthroughlondon.pdf
[64] Steve Doughty, *The £5m single mother: Taxpayers face extraordinary benefits bill to support a single broken family*, Daily Mail, 31 March 2010, http://www.dailymail.co.uk/news/article-1262425/5million-The-extraordinary-sum-cost-taxpayer-support-single-mother-benefits.html
[65] British Social Attitudes Survey, 2006
[66] *Teenage mothers: housing and household change*, Oxford Brookes University, http://www.brookes.ac.uk/schools/social/population-and-household-change/10_allen.html!
[67] Under-18 and under-16 conception statistics 1998-2005, http://www.everychildmatters.gov.uk/resources/IG00200/
[68] Department of Health abortion statistics, England and Wales, 2005
[69] Daniel Martin, *Britain is 'becoming the abortion capital of the world' claims Tory MP fighting to lower legal limit*, The Daily Mail, 06 May 2008, http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=564225&in_page_id=1770

their biological father, and are significantly less likely to be physically or sexually abused, or neglected; fathers play an important role in protecting their children from harm.

The children of lone parents, especially boys, are by contrast five times more likely to suffer physical and emotional abuse[70] and an astonishing 100 times more likely to suffer fatal abuse.[71] A single mother's new partner is an additional risk factor.[72] We read about the devastating effects of social workers' and Family Courts' policies of prioritising mother-only custody on an almost daily basis.

Two reports from the NSPCC showed that fathers tend to abuse their children significantly less than do mothers. *Child Maltreatment in the UK*, 2000,[73] showed 49% of children abused in the home were abused by their mothers and 40% by their fathers. A second report, *Child Maltreatment in the Family*, 2002,[74] showed that 65% of total child abuse (neglect, sexual, emotional and physical) is committed by mothers while only 8% is committed by fathers. Nevertheless, publicity from the NSPCC ignores these figures and presents the standard gendered version of violence and abuse in which men are portrayed as the principal or sole perpetrators.

[70] Cawson, P., *Child Maltreatment in the Family*, London: NSPCC, 2002.
[71] Daly, M. and Wilson, M., *Homicide*, New York: Aldine de Gruyter, 1988.
[72] Holmes W.C. (2007) *Men's childhood sexual abuse histories by one-parent versus two-parent status of childhood home*, University of Pennsylvania School of Medicine, Journal of Epidemiology and Community Health, March 2007
[73] Cawson, P., Wattam, C., Brooker, S., and Kelly, G., *Child maltreatment in the United Kingdom: a study of the prevalence of child abuse and neglect*, November 2000, NSPCC.
[74] Cawson, P., *Child maltreatment in the family: the experience of a national sample of young people*, February 2002, NSPCC.

1.2.5. New-borns

It is vital to ensure that fathers are engaged very early on in the child-raising process, and that they are not excluded, as they so often are, by jealous maternal grandmothers or by ignorant maternity staff. Evidence shows that fathers involved in feeding and nappy-changing early are less likely to sexually abuse their children;[75] fathers need time to get to know their new-borns and to understand them so that they can respond sensitively and appropriately to their needs.[76]

Fathers are as excited as mothers over their new-born children, and bond with them at the same time and pace as the mothers. Fathers actually hold and rock their babies *more* than mothers, and equal mothers in talking, kissing and imitating.[77] Correspondingly, infants form close attachments to their fathers (bonding) as readily and deeply, and at the same time as to their mothers.[78] Babies with secure attachments to their parents are more likely to grow into happy and well-adjusted children and adults.[79] Even at five months, boys who have more contact with their father are more sociable with a

[75] Pruett, K. (2000).
[76] Lamb, M.E., *The development of father-infant relationships*, in Lamb (ed.), *The Role of the Father in Child Development*, 3rd edition, 1997
[77] Greenberg & Morris, *Engrossment: The Newborn's Impact upon the Father*, American Journal of Orthopsychiatry, Vol. 44 (1974), p 526; Parke & O'Leary, *Father-Mother-Infant Interaction in the Newborn Period, in The Developing Individual in a Changing World*, Vol. 2, Riegal & Meacham, eds. (The Hague: Mounton, 1976), pp. 653 - 663.
[78] *Role of the Father*, Michael Lamb, pp. 1 - 63; Michael Lamb, *Father-Infant and Mother-Infant Interaction in the First Year of Life*, Child Development, Vol. 48 (1977), pp. 167 - 181.
[79] De Wolff, M. & van IJzendoorn, M., *Sensitivity and attachment: A meta-analysis on parental antecedents of infant attachment*, Child Development, 68, 1997, pp. 571-59

stranger [80] and have superior social skills and problem solving abilities.[81] Fathers use baby-talk less than mothers and encourage language development by talking to their infants in a more adult way, extending and challenging vocabulary. They also use higher orders of language use such as wit and sarcasm.[82]

1.2.6. Toddlers

Fathers play with their children more than mothers and differently, providing more unpredictable, stimulating, exciting and physical interaction;[83] this helps children's brains to develop normally and has been shown to boost IQ.[84] By age 11 children with involved fathers have an IQ a few percentage points above children with absent fathers.[85] When two-and-a-half-year-olds want to play, more than two thirds of the time they will choose their father over their mother.[86] A lot of physical father play corresponds to better, deeper friendships with peers among children; children learn self-control, how to manage and express their emotions and how to recognise others' cues.[87]

Through rough-and-tumble play fathers enable children to explore their strength and their boundaries, [88] they play a key role in developing children's confidence and self-esteem; [89] they challenge their children, which results in higher cognitive scores [90] and encourage the development of new skills and learning to take responsibility. They provide role models.

1.2.7. School children

Children who have good relationships with their fathers are less likely to experience depression, to exhibit disruptive behaviour or to lie and are more likely to exhibit altruistic behaviour.[91] Children who are brought up with their fathers are more likely to have good physical and emotional health, to achieve academically, and to avoid drugs, violence, and delinquency.[92] A large scale study in Sweden[93] showed

[80] Milton Kotelchuck, *The Infant's Relationship to the Father: Experimental Evidence*, Lamb, ed., Role of the Father, pp. 329 - 344.
[81] Parke, R.D. & Buriel, R., *'Socialization in the family: Ethnic and ecological perspectives'*, in Damon, W. & Eisenberg, N. (eds.), *Handbook of Child Psychology: Vol 3. Social, Emotional, and Personality Development*, 5th ed., New York: Wiley, 1998
[82] Laverne Antrobus, *The Biology of Dads*, BBC4 Fatherhood Season, 29 June 2010
[83] E.g. Lamb, M.E., *'Father-infant and mother-infant interaction in the first year of life'*, Child Development, 48, 1977,
[84] Nugent, J.K., *Cultural and psychological influences on the father's role in infant development*, Journal of Marriage and the Family, 53, 1991
[85] Daniel Nettle of Newcastle University, *Father's Day: the Importance of Dads*, Journal of Evolution and Human Behaviour
[86] Clarke-Stewart, *And Daddy Makes Three: The Father's Impact on Mother and Young Child*, Child Development Vol. 49 (1978), pp. 466 - 478.
[87] MacDonald & Parke, *Bridging the Gap: Parent-Child Play Interaction and Peer Interactive Competence*, Child Development vol. 55 (1985), pp1265 - 1277; Youngblade & Belsky, *Parent-Child Antecedent of 5-Year-Olds' Close Friendships: A Longitudinal Analysis*, Developmental Psychology Vol. 28 (1992), pp. 700 - 713; Snarey, *How Fathers Care for the Next Generation*, Cambridge, MA: Harvard University Press, pp. 35 - 36; Gottman, *The Heart of Parenting*, New York: Simon & Schuster, 1997, p. 171.
[88] Radin, *Primary caregiving fathers in intact families*, 1994; Radin, *The influence of fathers*, Social Work in Education, 1986;
[89] Biller, Fathers and Families, 1993.
[90] Clarke-Stewart, *'And Daddy makes three'*, Child Development, 1978
[91] Parke, R.D. (1996).
[92] Horn, W., & Sylvester, T. (2002); *The Relationship Between Family Structure and Adolescent Substance Abuse* U. S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA). (1996). Rockville, MD: National Clearinghouse for Alcohol

that fatherless children suffer more depression, abuse drugs and alcohol more, have more accidents and more often attempt suicide than their peers.

A 2002 Government report declared,[94]

> *Fathers play an extremely important role in their children's lives and a plethora of research indicates that father involvement is significantly related to positive child outcomes. A father's interest in a child's schooling is strongly linked to educational outcomes for the child. Fathers who devote time to their sons are giving them a greater chance to grow up as confident adults. Boys who feel that their fathers devote time, especially to talk to them about their worries, school work and social lives, almost all emerge as motivated and optimistic men. Father involvement in children's education at age 7 predicts higher educational attainment by age 20 in both boys and girls.*

Fathers boost children's educational attainment; in one study, children with involved fathers achieved grades 43% higher than other children,[95] the involvement of a father with his child at the age of 7 and 11 has been shown to predict the number of national examination passes at age 16.[96] Primary school children score higher on empathy if they have had secure attachments to their fathers.[97]

Fatherlessness has also been closely associated with attention deficit and hyperactivity disorder (ADHD).[98] Fatherless children are twice as likely to be diagnosed and prescribed drugs such as Ritalin.

1.2.8. Girls

Teenage girls caught up in custody and contact battles report the stress and overload of mothers demanding their support in the fight.[99] Rather than being cared for by the parent, the child is coerced into taking on the role of carer for the warring parent, and is robbed of her childhood; she must also become an ally and thus an instrument in the removal from her life of her father, and this imposes on her a huge conflict of loyalties and consequent stress.

In general, girls who have a warm relationship with their father and feel accepted by them are more likely to feel comfortable and confident when relating to the opposite sex. Girls whose fathers play with them a lot tend to be more popular with their peers and more

and Drug Information; Harper, C., & McLanahan, S. S. (1998). Father Absence and Youth Incarceration. Paper presented at the Annual Meeting of the American Sociological Association, San Francisco, CA; Brenner, E. (1999). *Fathers in prison: a review of the data*. Philadelphia, PA: National Center on Fathers and Families.

[93] Ringbäck Weitoft, G., Hjern, A., Haglund, B., Rosén, M. (2003), *Mortality, severe morbidity, and injury in children living with single parents in Sweden: a population-based study*, The Lancet, Elsevier, Volume 361, Number 9354, 25, January 2003

[94] Department for Education and Skills, *The Impact of Parental Involvement in Children's Education*, 2002

[95] Nord, C., & West, J. (2001).

[96] Meta analysis by University of Lancaster of 700 reports spanning 20 years, June 2001.

[97] Biller., H.B., Fathers and Families: Paternal Factors in Child Development, Westport: Auburn, 1993; Biller, H.B. & Trotter, R.J., The Father Factor, New York: Simon & Schuster, 1994.

[98] Lisa Strohschein, 2007

[99] Bliss Survey (2005) *Girls take strain of parents' split*, The Times – Britain, UK News, By Alexandra Frean, Social Affairs Correspondent, 24 February 2005, http://www.timesonline.co.uk/article/0,,2-1497111,00.html

assertive in their interpersonal relationships throughout their lives.[100] During her teen years and later, a girl who has not had a rewarding relationship with her father is apt to feel insecure around males. She may feel unattractive, doubt that any man could love her for herself, and distrust men in general.[101]

Girls need their fathers to show them how loveable they are; a girl is usually able to deal with the death of a father, but when he is absent she is more likely to blame herself and believe that there must be something wrong with her. Such negative internalisations lead to a range of pathologies, including:[102]

- shame and abandonment issues and depression — with an increased risk of self-medication through alcohol and illicit drugs;
- self-abuse, including self-harming and suicide attempts;
- decreased feelings of security — and a search for security from delinquent males, often leading to drug abuse;
- difficulty trusting men;
- a lifetime of yearning for male attention, often from much older males; Father's Day becomes a day of mourning;
- promiscuity — 'So many people want me; why can't dad see how desirable I am?';
- teenage pregnancy;
- rifts with their mothers — children aren't fools and often blame their mothers for the father's absence; this in turn can lead to girls running away from home and associated problems;
- increase in violence — fatherless girls can be very angry, and will lash out at siblings and peers;
- increased risk of gang membership (see below);
- diminished ability to separate thinking from feelings (emotional intelligence);
- unresolved grief;
- spiritual distress; a sense of abandonment by God.

It has been suggested that a father's pheromones can delay the onset of puberty in girls, possibly as an incest-avoidance mechanism.[103]

Experiments on laboratory animals have confirmed this. The absence of a father, on the other hand, is associated with precocious

[100] Parke et al, Family-Peer Systems: In Search of the Linkages, Kreppner & Lerner, eds,. Family Systems and Life Span Development (Hillsdale, NJ: Erlbaum, 1989), pp. 65 - 92. As cited in Parke & Brott Throwaway Dads (Boston: Houghton Mifflin Co., 1999).
[101] Richard Warshack, The Custody Revolution, p. 44 - 45.
[102] Mark Sanders, LCSW, CADC & Shannon Mayeda, PhD, LCSW, *Daddy's Little Girl: Fatherlessness and Adolescent Substance Abuse,* November 2008, http://www.counselormagazine.com/content/view/815/63/

[103] Ellis, B., McFadyen-Ketchum, S., Dodge, K., Pettit, G., and Bates, J., Journal of Personality and Social Psychology, Vanderbilt University, Nashville, Tennessee, 2000.

puberty,[104] while exposure to the pheromones of unrelated males can also cause premature puberty.[105] One theory is that exposure to a father's pheromones slows down maturation, another is that father-absence is more likely to lead to exposure to unrelated males.

Research shows that girls are reaching puberty 18 months earlier than their mothers and 2 years earlier than their grandmothers.[106] As many as 1 in 6 girls are entering puberty at age 8 compared with 1 in 100 a generation ago.[107] The children of mothers who first menstruated at age 11 are twice as likely to become obese as those whose mothers first menstruated at 15.[108] Such children are also more likely to experience early growth spurts which are also associated with a higher risk of later poor health.[109] Childhood obesity has reached epidemic levels in the UK[110] and will become a growing cause of ill health in children and young adults. Between 1995 and 2004 the percentage of obese 10 year olds increased from 9.9% to 13.4%.[111] By 2008 27.3% of children were overweight or obese.[112]

Research by the University of St Andrews[113] showed fatherless girls to be heavier, less healthy in appearance and less physically attractive. Pat Draper and Henry Harpending[114] suggested that this is an evolutionary response to make raising children more effective in an environment without paternal care.

Children whose fathers play a restricted or non-existent parenting role are more likely to become obese; there is no corresponding association with mothers' degree of parenting.[115] Precocious puberty is also associated with depression, promiscuity, teenage pregnancy and academic failure.

1.2.9. Boys

Fatherless boys share many of the problems their sisters experience; they also lose their role model. When fathers are away for long periods of time, as in the case of sailors at sea, their boys become

[104] Research by Joyce Lee of the University of Michegan, reported in New Scientist, *Childhood obesity brings early puberty for girls*, 05 March 2007, http://www.newscientist.com/article/dn11307-childhood-obesity-brings-early-puberty-for-girls.html

[105] Child Development, March/April 2001.

[106] *Precocious Puberty*, research by Psychologist Dr Aric Sigman, commissioned by Clearasil.

[107] Research from Bristol University

[108] Research by Ken Ong at University of Cambridge, reported in New Scientist, *Mother's early puberty boosts child's obesity risk*, 24 April 2007, http://www.newscientist.com/article/dn11696-mothers-early-puberty-boosts-childs-obesity-risk.html

[109] Ibid.

[110] Estimates from 2001, for example, suggested that 8.5% of 6 year olds and 15% of 15 year olds were obese, Parliamentary Office of Science and Technology Postnote on Childhood Obesity, September 2003, http://www.parliament.uk/post/pn205.pdf. Between 1995 and 2004 the percentage of obese 10 year olds increased from 9.9% to 13.4% .

[111] Hansard, 19 April 2007, http://www.publications.parliament.uk/cgi-bin/newhtml_hl?DB=semukparl&STEMMER=en&WORDS=obes&ALL=&ANY=&PHRASE=&CATEGORIES=&SIMPLE=obesity&SPEAKER=&COLOUR=red&STYLE=s&ANCHOR=70419-0007.htm_spnew0&URL=/pa/cm200607/cmhansrd/cm070419/debtext/70419-0007.htm#70419-0007.htm_spnew0

[112] Department of Health statistics, http://www.dh.gov.uk/en/Publichealth/Healthimprovement/Obesity/DH_078098

[113] Boothroyd, L.G. & Perrett, D.I., *Facial and bodily correlates of family background.* Proceedings of the Royal Society of London Series B-Biological Sciences, *273*, 2375-2380, 2006

[114] Draper, P. & Harpending, H., *Father absence and reproductive strategy – An evolutionary perspective*, Journal of Anthropological Research, 38, 255–278, 1982

[115] Study by the Centre for Community Child Health at The Royal Children's Hospital, Melbourne, and the Murdoch Children's Research Institute, May 2007, http://www.newswise.com/articles/view/529457/.

less popular with classmates and do not enjoy friendships as much as do boys who have more contact with their fathers.[116]

The greater the involvement of fathers in the lives of their adolescent sons, the fewer the behavioural problems they will have in terms of aggression, anti-social behaviour and negative feelings of anxiety, depression and low self-esteem.[117]

The presence of a father is also necessary for the normal sexual development of their sons; fatherlessness has been implicated in gender identity disorder (which can manifest itself as transvestism and transsexualism). One study found that of the less disturbed males, 54% were fatherless; of the most profoundly disturbed, 100% were fatherless, and 75% had no father substitute or male role model. The age at which a boy loses his father was significant, and in the study 80% who had no father had lost their fathers by the age of five.[118]

116 Richard Warshack, The Custody Revolution, p. 41.
117 Carlson, M.J. (2006) *Family structure, father involvement and behavioural effects on adolescents*, Journal of Marriage and Family, Vol 68, No 1, February 2006, pp 137-154, based on the 1996 and 2000 data cohorts of the USA National Longitudinal Youth Study on 2,733 10-14 year old adolescents living only with their mothers
118 George A. Rekers, *Gender Identity Disorder in The Journal of Family and Culture*, Vol. II, No. 3., 1986, The Free Congress Research and Education Foundation

1.2.10. Teenagers

Men and women who have had warm paternal relationships have better, longer marriages and engage in more recreation.[119] Women have better relationships with their partners and better physical and mental health if they had good childhood relationships with their fathers.[120] Adolescents of both sexes from fatherless families engage in greater and earlier sexual activity,[121] and British teenagers are the most sexually active in Europe,[122] further contributing to the scourge of teenage pregnancy. Children of lone parents are twice as likely to have mental health problems,[123] and two to three times as likely to develop schizophrenia.[124] Britain has the highest level of self-harming in Europe.[125] Children of lone parents are twice as likely to smoke, drink heavily or take drugs.[126]

119 Franz, McClelland, & Weinberger, 'Childhood Antecedents of Conventional Social Accomplishments in Midlife Adults: A 36-Year Prospective Study,' Journal of Personality and Social Psychology Vol. 60 (1991), pp. 586 - 595.
120 Sarkadi et al., Fathers' involvement and children's developmental outcomes: a systematic review of longitudinal studies. Acta Paediatrica. 97.2, pp 153-158, February 2008
121 Carol W. Metzler, et al. *The Social Context for Risky Sexual Behavior Among Adolescents*, Journal of Behavioral Medicine 17, 1994.
122 Institute for Public Policy Research, October 2006, http://www.ippr.org/pressreleases/
123 Meltzer, H., et al., *Mental Health of Children and Adolescents in Great Britain*, London: The Stationery Office, 2000.
124 Study by Dr Craig Morgan of Kings College, London, reported in the Guardian, 22 November 2006, http://society.guardian.co.uk/socialcare/story/0,,1953959,00.html.
125 Catherine McLoughlin, et al., *Truth Hurts*, Camelot Foundation and Mental Health Foundation, March 2006, http://observer.guardian.co.uk/uk_news/story/0,,1739832,00.html
126 Sweeting, H., West, P., and Richards, M., *Teenage family life, lifestyles and life chances: Associations with family structure, conflict with parents and joint family activity*, International Journal of Law, Policy and the Family, 1998.

Youth offending costs the UK £13 billion every year,[127] 70% of young offenders identified by Youth Offending Teams come from fatherless families.[128] Boys from lone-parent homes are twice as likely as those from two-birth-parent families to be locked up by the time they reached their early 30s;[129] a study of boys aged between 12 and 16 from a deprived area of south London compared those at a secure unit for unmanageable adolescents with those having no criminal convictions; 80% of the 'good boys' were close to their biological fathers compared with only 4% of the 'bad boys.' The research showed stepfathers to be an additional risk factor.[130]

Fatherlessness leads directly to gang membership; according to Camila Batmanghelidjh, the heroic director of *Kids Company*, 'gang membership provides these young people with a sense of belonging, that they do not benefit from anywhere else.'[131] Iain Duncan Smith's *Breakthrough London* report[132] records the comments of one gang member, 'He said that the anger created by family breakdown "messes children up", which encourages them to get involved in violence and gangs'.

[127] Figure from July 2006; the social and economic cost of crime is estimated at £60 billion a year for England and Wales according to the Home Office Research Study 217 published in 2000. Young people aged 10 -17 make up 22% of the people who commit crime and are therefore responsible for 22% of the cost of crime which computes to £13B a year.
[128] Review 2001/2002: *Building on Success*, Youth Justice Board, London: The Stationery Office (July 2002).
[129] Harper, C. and McLanahan, S. (August 1998), *Father absence and youth incarceration*, San Francisco: paper presented at the annual meetings of the American Sociological Association, http://www.aboutdads.org/reports/Father_Absence_and_Youth_Incarceration.pdf
[130] Research carried out by Dr Jenny Taylor for the South London and Maudsley NHS trust.
[131] Duffy, M. P and Gillig, S. E (Editors), *Teen Gangs: a global view*, Greenwood Press
[132] Iain Duncan Smith et al., *Breakthrough London: ending the costs of social breakdown*, the Centre for Social Justice, 14 April 2008, http://www.centreforsocialjustice.org.uk/client/downloads/breakthroughlondon.pdf

Fatherless homes provide rich pickings for those who recruit for gang membership, while strong family involvement protects young people against becoming ensnared. Many fewer gang members than non-gang members live with their biological parents.[133]

Founder of the charity *Mothers Against Guns* Maureen Lynch says, 'family values have gone, young people involved in gun crime come from deprived, broken homes and more often than not have been excluded from school. The rise in gun crime is due to the frustration, desperation and jealousy that these young people feel, compounded by the increased availability of guns.'[134] Under the bravado, they are terrified children,

> *They don't know what it's like when you come from a family that didn't have a father there to guide you in the right path. They don't know what it's like when there is nothing to eat when you come home from school. They don't know how it feels when your mother tells you that you need to quit school to get a job, because there ain't enough money for food.*[135]

This problem is particularly acute in the black community, where a condition called 'father hunger' has been described,

> *These young men are crying out for fathers… They are looking for that affirmation, they are looking for that identity; they are looking for that role model. They do not find it in the home*

[133] Xiaoming Li et al., *Risk and Protective Factors Associated With Gang Involvement Among Urban African-American Adolescents*, Youth & Society 34[2002]: 172-194
[134] Duffy, M. P and Gillig, S. E (Editors), *Teen Gangs: a global view*, Greenwood Press
[135] Salzman, M., *True Notebooks*, Bloomsbury, 2004.

and they go out and meet a group of men or young boys who are involved in devious activities; they find affirmation.[136]

We understand the lack of effective father involvement promotes in young people a condition they have called 'father hunger'. African Caribbean children unable to forge a father child closeness experience a trauma, leaving them vulnerable to peer pressure and external influences.[137]

Camila Batmanghelidjh rejects the stereotypical explanation,[138]

Often people think it is the males who are the culprits, the irresponsible people who actually come along and make these girls pregnant and walk out, and they underestimate the level of rejection and cruelty from the females towards the males. I actually think the males are vulnerable. It starts the minute the adolescent boy looks slightly like a male and behaves like a male and often the mother wants that young male banished from the house and a hate relationship often develops.

Paul Skerret, who runs the support organisation *Black Men and Fatherhood*, blames government policy and a legal system which,

Continually aids in the destruction of families, with its ludicrous orders. A lot of these men are battling in the courts to see their children.[139]

Youth worker Shaun Bailey agrees, 'I put it down to Government policy robbing adults of responsibility'.[140] Neil Solo of the *Babyfather Alliance* says,[141]

In our experience, talking with African Caribbean fathers, overwhelmingly the majority want contact and are frustrated in that generally by the operation of the law which would imply that mothers and women are the primary caregivers and also understanding that difficulties post-relationship will make the father visiting and building a relationship with the child somewhat more difficult. I would say that by and large in our experience, talking with fathers, the majority want that contact.

Even the judiciary is waking up to the calamitous effects of fatherlessness; In April 2008 one of the most senior Family Court judges, Sir Paul Coleridge, spoke to members of *Resolution*:[142]

136 House of Commons Home Affairs Committee, *Young Black People and the Criminal Justice System, Second Report of Session 2006–07 Volume II Oral and written evidence*, 22 May 2007, http://www.publications.parliament.uk/pa/cm200607/cmselect/cmhaff/181/181ii.pdf Question 71.
137 Ibid., Main Point No. 6.
138 *Young Black People and the Criminal Justice System*, House of Commons Home Affairs Committee, 22 May 2007, http://www.publications.parliament.uk/pa/cm200607/cmselect/cmhaff/181/181ii.pdf
139 Comments taken from article *Black fatherhood group hits back at attack on black parents*, in Black Britain, November 2006, http://www.blackbritain.co.uk/news/details.aspx?i=2317&c=uk&h=Black+fatherhood+group+hits+back+at+attack+on+black+parents
140 *Young Black People and the Criminal Justice System*, House of Commons Home Affairs Committee, 22 May 2007, http://www.publications.parliament.uk/pa/cm200607/cmselect/cmhaff/181/181ii.pdf
141 Ibid.
142 Lord Justice Coleridge, keynote speech delivered to Resolution National Conference, *Family Life – Family Justice – Fairness*, 5 April 2008, http://vocuspr.com/vocuseu/Newsroom/ViewAttachment.aspx?SiteName=ResolutionNew&Entity=PR

> *It is a never ending carnival of human misery. A ceaseless river of human distress... The effects of family breakdown on the life of the nation and ordinary people in this country will, within the next 20 years be as marked and as destructive as the effects of global warming. We are experiencing a period of family meltdown whose effects will be as catastrophic as the meltdown of the ice caps.*

In June 2009 Coleridge emphasised the public nature of the crisis and the need to return to marriage as a gold standard,[143]

> *In the end it is the behaviour of individuals which has driven us here and it is only changes in behaviour which can make a radical difference and ease the burden on the services.*
>
> *The fundamental change in individual attitude and behaviour that is required, is in our assumption that the way in which we conduct our private lives in relation to both the production and parenting of children or the break-up a parental relationship, is a private matter which only affects the individuals directly concerned.*
>
> *No, it is not. It is a public matter; of real public interest and real public concern.*
>
> *...the reaffirmation of marriage as the gold standard would be a start, with all its faults. Marriage is by no means perfect or the only way or only structure for living with a partner but statistically it has proved to be the most enduring and, statistically, the children of such relationships perform the best. That is simple provable fact which has to be faced however unpalatable to its detractors. Support for marriage therefore makes pragmatic common sense because it is demonstrably in the public interest and ultimately saves money (like eating healthily!) That too can properly engage government.*

We are constantly being fed the politically correct platitude that single mothers do a tremendous job in difficult circumstances. This is evasive spin: it simply isn't true. As a group, single mothers do not do especially well at bringing up their children.

Some do indeed do a good job – just as some married couples don't– but many do not. A useful analogy is drink-driving: for a time the chances are you will get away with it; but it is generally viewed now as irresponsible and anti-social. If you look at the perpetrators of violent crime, particularly the worst violent crimes, you will almost invariably find family breakdown, and children who were brought up forbidden to know their fathers.

Asset&AttachmentType=F&EntityID=576255&AttachmentID=5eaa344f-20ce-4c7c-9077-7b0d1ee9bfba

[143] Speech delivered to the *Family Holiday Association*, House of Commons, 16 June 2009, http://www.fhaonline.org.uk/Documents/COUNCIL090616MrJusticeColeridgeSPEECH.pdf

1.3. Overcoming opposition

Fathers 4 Justice believe that the continuing involvement of both parents in their children's lives is best protected by an arrangement of joint legal and physical custody: an arrangement in which both parents share in the day-to-day care and decision making for their children in a mutually agreed post-separation agreement.

Shared residence is repeatedly rejected by opponents who believe that mothers should have exclusive control over who has access to their children. Shared residence is deliberately misrepresented as the belief in the rigid apportioning of residence in an exact 50/50 division. Only the most unsophisticated campaigners have ever called for such an impractical arrangement to be the norm. Shared residence has been subject to a torrent of misleading and malicious criticism, and ironically has been scrutinised far more intensely than the conventional residence/contact paradigm ever was. Happily there is a growing body of evidence which demonstrates that sole custody arrangements are not beneficial to the development or contentment of children, and that they are in fact psychologically and developmentally deeply damaging.

At **5.5.3** we shall suggest some of the legal arguments you can use in Court to make a case for shared parenting through an order for shared residence. Some form of shared parenting is so obviously the fairest and most sensible solution following divorce or separation that any opposition to it is manifestly no more than the expression of prejudice. The only alternative, after all, is *not* to share parenting. The arguments used against it need to be disposed of; the following sections chart the growing acceptance of Shared Residence Orders by the courts and offer arguments against those who oppose Court-ordered shared parenting.

1.3.1. The Family Justice Review

The Family Justice Review Interim Report specifically rejected a presumption of post separation shared parenting such as had been demanded for decades by parenting organisations.

The panel's consideration of shared parenting was considered in an Annex P to the report; unfortunately they represented shared parenting falsely in terms of equally shared time rather than of shared responsibility and authority, quoting the otiose conclusion of the 2004 report *Parental Separation: Children's Needs and Parent's Responsibilities*,

> *The government does not … believe that an automatic 50:50 division of the child''s time between the two parents would be in the interests of most children.*

The panel also rejected the notion that non-resident parents are disadvantaged in the Family Courts, citing as evidence the 2008 Hunt and Macleod report.[144] In *Family Justice on Trial* we criticised the conclusions of this report which actually showed 20% of contact applications result in no contact at all, and that where contact was

[144] Joan Hunt and Alison Macleod, *Outcome of applications to court for Contact Orders after parental separation or divorce*, Ministry of Justice, September 2008

ordered the levels were very low, with fewer than half of children allowed to stay with their fathers overnight. We suspect the FJR panel placed too much reliance on this report which only examined 308 cases. We recognise, however, the paucity of good academic research into this area in the UK and that for every fathers' group emphasising the difficulties fathers have with contact there is a bucket-full of well-funded organisations opposing paternal contact.

The panel looked at the experience of shared parenting in other jurisdictions, such as Sweden, where the feminist backlash against reforms led to the law being changed back in 2006. It looks as if the same will happen in Australia; the panel reported a study by Jennifer McIntosh[145] which claimed an increase in parental conflict and in the risks to children following shared parenting legislation. These findings are contradicted by numerous reports by other academics (e.g. Bender 1994, Gunnoe and Braver 2001, Bauserman 2002, Nielesn 2010, etc), none of which is referenced by the FJR panel.

1.3.2. A common form of order

> *The position of the Government is that Parliament's intention was that shared residence should NOT be a common form of order, but that was not the same as saying that shared residence should not be a common form of arrangement. By its very nature though, shared parenting requires a high degree of cooperation between parents… cases that reach the Court arena have inevitably gone beyond the stage where this level of mutual cooperation can be achieved.*
>
> Former Children's Minister Margaret Hodge[146]

Was Margaret Hodge correct that it was not the intention in the Children Act to make orders for shared residence a common form of order? She displayed the common prejudice that an application to the Family Courts is an indication of irremediable dysfunction. A healthy family justice system would rather be able to help parents where cooperation is difficult and would prevent the implacable hostility developing which makes cooperation impossible; where hostility exists, an order for shared residence articulates to the hostile parent their responsibility for cooperation.

It was believed at the time the Act was drafted that where shared parenting was appropriate there would be no need for an order at all, and that where there was conflict orders for sole residence would be more suitable. The irony is that the courts were already moving towards shared residence. Over the 6 years before the Act the percentage of custody orders which were shared had doubled to 26%. There was wide regional variation, and shared orders were most common in the south and rarer in the north.

It was the intention behind the Children Act to make a new type of order which was sufficiently flexible to be applicable to a wider range of situations than the order it replaced. The authors of the Law

[145] McIntosh, J et al, *Post-separation parenting arrangements and developmental outcomes for infants and children*. Collect reports. Three reports prepared for the Australian Government Attorney General's Department, 2010

[146] Children's Minister Margaret Hodge, November 2003.

Commission's *Report on Guardianship and Custody*, Law Com. No. 172[147] gave this guidance, citing positive American research:

> *More commonly, however, the child will live with both parents but spend more time with one than with the other... It is a far more realistic description of the responsibilities involved in that sort of arrangement to make a Residence Order covering both parents rather than a Residence Order for one and a Contact Order for the other.*

Official guidance to the Act repeated this sentiment, 'a shared care order has the advantage of being more realistic in those cases where the child spends considerable amounts of time with both parents, brings with it certain other benefits, and removes any impression that one parent is good and responsible whereas the other parent is not'.[148] Whether or not it was the original intention behind the Act to make shared residence the *standard* order has been widely debated. *The Report on Guardianship and Custody* did not make this clear, but the passage quoted shows the Commission's thinking was veering away from the sole-residence-plus-contact option towards shared residence. This sensible position was contradicted by the Children Act 1989 Guidance and Regulations, Vol. 1, Court Orders, which in paragraph 2.2(8) repeated the old argument from 'stability',

> *...it is not expected that it would become a common form of order, partly because most children will still need the stability of a single home, and partly because in the cases where shared care is appropriate there is less likely to be a need for the Court to make any order at all.*

The Report on Guardianship and Custody had referred to the 'person *or persons* with whom the child is to live'; the final legislation removed the crucial words 'or persons', sending a clear message to judges that the new Residence Orders were not to be made in favour of *both* parents.

During the Lords debate on the Act[149] Lord Kilbracken had queried this point and called for an amendment. The Lord Chancellor, Lord Mackay, replied gnomically that under Section 6(c) of the Interpretation Act 1978 'words in singular include the plural and words in the plural include the singular'. Lord Kilbracken withdrew his amendment, but not without observing, 'what is said in your Lordships' committees on the record is in fact never brought up again in any court'.

In Re H (A Minor) (Shared Residence) [1994] 1 FLR 717 Lord Justice Purchas articulated the prevailing orthodoxy that such an order 'would rarely be made and would depend upon exceptional circumstances.' In the same year the President, Elizabeth Butler-Sloss, said in A v A (A Minor) (shared Residence Order) [1994] 1 FLR 669 that such an order should only be made if there were something unusual about the case and a positive benefit in making an order which was not a conventional order, and that it was unlikely to be made if there were unresolved issues between the parents. Yet in 1995 in Re H[150] Lord Justice Ward made a 'therapeutic' order to articulate to the children that they 'lived

[147] Available on request from the Law Commission
[148] Dame Elizabeth Butler-Sloss, Children Act 1989 Guidance and Regulations, Volume 1, court Orders, paragraph 2.2(8)
[149] Hansard, 19 December 1988
[150] Re H (Shared Residence: Parental Responsibility) [1995] 2 FLR 883

with the respondent and that they did not just visit him'; he expressed the hope that Shared Residence Orders

> *may gradually win more grudging approval from the courts if the Judges begin to acknowledge that such orders can reflect practical arrangements made by parents and their children which work well in putting into satisfactory practice that purpose promoted by the Act which emphasises that parenting is a continuing and shared responsibility even after a separation.*

1.3.3. Overcoming conflict

One of the oldest arguments against shared parenting is that it should not be applied where parents are conflicted. Since only conflicted parents end up in Court this is an argument against courts ever ordering shared parenting. All decisions in the Family Courts are – or should be – balancing acts between different risks. Some risks are potentially very damaging, such as severe child abuse or the loss of a parent; others are less severe, such as living in a household where there is conflict, or merely adequate parenting.

CAFCASS – the body of social workers who advise the courts on the outcomes for children – do not always support shared parenting, and are likely to recommend against it in cases where there is parental conflict. The legal precedent for this position is the 1986 judgement Riley v Riley [1986] 2 FLR 429 in which the Court of Appeal expressed its disapproval of orders for joint custody,

> *To keep a child going backwards and forwards each week between mother and father, with no single home, is prima facie wrong.*

In *CAFCASS Contact Principles, practice guidance and procedures*[151] of August 2004 CAFCASS stuck to the old view that parental cooperation is essential in shared parenting, and rather desperately quoted an inept, poorly-known and now defunct charity, the *Association for Shared Parenting*, in support,

> *By far the main obstacle to successful shared parenting is ongoing parental hostility. If one or both parents are unable to separate their feelings about each other from the distinct right of the child to be free of the parental conflict, then the result is invariably an emotionally damaged child. At its worst, this can alienate a child from one of its parents.*

This isn't actually an argument against making orders for shared residence, and in many of the orders made by the courts for shared residence a warning along these lines is issued to the parents. The force of the passage is that where the Court makes such an order the onus is on both parents to make it work. CAFCASS go on to state in *Contact Principles* that the belief a shared residence arrangement can reduce animosity is 'generally mistaken' and that a high level of cooperation is required, otherwise the order is likely to increase animosity. They don't offer any research-based evidence for what is otherwise merely an opinion. We would argue instead that the standard sole-residence-plus-contact arrangement always leaves one

[151] http://www.fnf.org.uk/downloads/ContactPrinciplesDraftv1%5B1%5D.16.08.pdf

parent considerably more dissatisfied and thus more likely to pursue satisfaction through litigation. There is actually good evidence that these orders *can* reduce animosity.

Where there is hostility there is no evidence that shared parenting will make it worse, and its effect on children will be tempered by maintaining relationships with both parents. Opponents state that a parent coerced into shared parenting will not cooperate, but others have demonstrated this approach reduces conflict over time. M Gunnoe and Sanford Braver, for example, observe that joint custody couples report lower levels of conflict than sole-custody couples.[152] In his meta-analysis Robert Bauserman found that,[153]

> *children in shared custody settings have fewer behaviour and emotional problems, higher self-esteem, better family relations and better school performance than children in sole custody arrangements.*

Similarly, in their meta-analysis,[154] Amato and Gilbreth showed that a close continuing relationship with a father was associated with better behavioural and emotional adjustment and with academic achievement.

Children themselves want parenting from both of their parents following separation,[155] and state that shared care arrangements are more satisfying for them than sole care.[156] A long-term Harvard study[157] showed that children in post-separation shared parenting arrangements were less depressed, showed fewer maladjusted behaviours and achieved better academic results.

Shared parenting is also beneficial to parents, and parents express greater satisfaction with shared parenting compared with all other post-parenting arrangements.[158] Where parents are more satisfied there is less likely to be conflict.[159] Bauserman's study indicated that court-ordered shared residence can substantially reduce parental conflict compared with sole-residence-plus-contact arrangements and thus reduce the exposure of children to conflict.[160]

The sole-residence-plus-contact model, on the contrary, will always lead to conflict and further litigation because it goes hand-in-hand with the adversarial model and it enables one parent to eliminate the other, who must fight for contact until he is forced through poverty, ill health or despair to concede defeat. To allow conflict to stand as

[152] Gunnoe, M. L., & Braver, S. L., *The effects of joint legal custody on mothers, fathers, and children, controlling for factors that predispose a sole maternal versus joint legal award*, Law & Human Behavior, 25, 25–43, 2001
[153] R. Bauserman, *Child adjustment in joint-custody versus sole custody arrangements: a meta-analytic review*, Journal of Family Psychology, 2002, http://www.apa.org/journals/releases/fam16191.pdf
[154] Amato, P. R., & Gilbreth, J. G., *Nonresident fathers and children's well-being: A meta-analysis*. Journal of Marriage and the Family, 61, 557–573, 1999.
[155] Fabricius, W. V., *Listening to children of divorce: New findings that diverge from Wallerstein, Lewis, and Blakeslee*, Family Relations, 52 (4), 385–396, 2003
[156] Kelly, J., *Developing and implementing post-divorce parenting plans: Does the forum make a difference?* In J. Bray and C. Depner (Eds)., Non-Residential Parenting: New Vistas in Family Living, Chapter 7 (pp. 136-155). Newbury Park, CA: Sage Publications, 1993
[157] Buchanan, C.M., MacCoby, E.E., & Dornbusch, S.M. (1996). *Adolescents after divorce,* Harvard University Press, 1996-10-01, ISBN-13: 9780674005174, ISBN: 0674005171
[158] Parkinson, P. & Smyth, B., *Satisfaction and dissatisfaction with father-child contact arrangements in Australia*, Child and Family Law Quarterly. Vol.16, No. 3, pp. 289-304. 2004
[159] Study of 968 men and 1138 women by the Australian Institute of Health and Welfare, in *Child Abuse and Neglect Australia 1994-1995,* Canberra. (Child Welfare Series, No. 16), pp.46-47, 1996
[160] Op. Cit., Bauserman

an argument against shared residence would serve as a huge incentive for the promotion of conflict by those desiring sole residence.

There is a further argument that if children are to develop into mature adults it is essential for them to witness their parents resolve their disputes and disagreements; this is one of the essential skills of adulthood. Children brought up in single parent families do not acquire these skills. They do not learn how to assert themselves or stand up to peer pressure. They avoid conflict and become anxious in unfamiliar situations.

Watching their parents resolve their differences in a mature and positive way can make children feel more secure. If they realise that even quite heated disputes can be sorted out and are a normal part of human relations they will find their own lives much easier. Children need to learn that you can still love someone and get angry with them; they need to learn how to control their own anger, and calming techniques which will reduce anger in others.

The courts began to catch up with the academics. Butler-Sloss was forced to back-pedal on her position in A v A following the introduction of the Human Rights Act 1998. On 20th November 2000 in the seminal D v D (Shared Residence Order) [2001] 1 FLR 495[161] she and Lady Justice Hale produced an entirely contrary judgement which established that a Shared Residence Order could be made where there *was* conflict and animosity. In highly conflicted proceedings, the lower court judge, Ansell J, had made an order on 1st June 2000, on the father's application, for shared residence,[162]

> *the making of a joint Residence Order underlying the status of the parents as equally significant in the lives of the children would be likely to diminish rather than increase that conflict.*

Unfortunately the mother disagreed and applied that September to suspend or supervise the father's contact. The application was dismissed by Connor J on 11th October; again the mother appealed. On 20th November Lady Justice Hale reviewed the history of shared residence in which the courts had moved away from the earlier principle that shared residence required 'exceptional circumstances'; she concluded,

> *Contrary to earlier case law, it is not necessary to show that exceptional circumstances exist before a Shared Residence Order may be granted. Nor is it probably necessary to show a positive benefit to the child. What is required is to demonstrate that the order is in the interests of the child, in accordance with the requirements of s.1 of the Children Act 1989.*
>
> *It seems to me that there is indeed a positive benefit to these children in those facts being recognised in the order that the Court makes. There is no detriment or disrespect to either parent in that order. It simply reflects the reality of these children's lives. It was entirely appropriate for the judge to*

[161] http://209.85.229.132/search?q=cache:zharkVpB6dQJ:www.fnf.org.uk/downloads/Re_D_v_D.rtf+D+v+D+(Shared+Residence+Order)+%5B2001%5D+1+FLR+495&cd=2&hl=en&ct=clnk&gl=uk

[162] D v D [2001] 1 FLR 498

> *make it in this case and neither party should feel that they have won or lost as a result. I would, therefore, dismiss the appeal.*

Thus at the turn of the century this type of order came to be seen as a way of defining an on-going situation (the children spent 38% of their time with the father) rather than prescribing a new one: the sole-residence-plus-contact paradigm remained the rule; Hale confirmed this in Re A (Shared Residence) [2002] 1 FCR 177,

> *But the law is that parents already have shared Parental Responsibility for their children… A Residence Order is about where a child is to live. It is very difficult to make such an order about a child who is not only not living with one of the parents but is, for the foreseeable future, unlikely even to visit with that parent. The court's order has to be designed to reflect the real position on the ground.*

Lord Justice Thorpe showed a growing acceptance of shared residence in 2003 and a rejection of the winner-takes-all approach, referring to D v D in Re A (Children) (Shared Residence) [2003] 3 FCR 656,

> *There is a need for courts of trial to recognise that there may well be cases that are better suited by a joint Residence Order than by Residence Order to one parent alone. Where there is a proximity of homes and a relatively fluid passage of the children between those two homes, the judicial convention that the welfare of the children demanded a choice between one parent or the other as a guardian of the Residence Order in order to promote the welfare of the children no longer runs as it used to run.*

D v D was also cited by Mr Justice Wall in A v A (Shared Residence) [2004] 1 FLR 1195,[163] another case in which there was high conflict and false allegations had been made against the father. Wall made it clear that had there been no conflict and the parents had been capable of working together he would, as the Children Act requires, have made no order. Because of the high level of conflict, however, an order was necessary, and the making of the order for shared residence confirmed that the parents had equal responsibility towards their children,

> *If these parents were capable of working in harmony, and there were no difficulties about the exercise of shared Parental Responsibility, I would have followed Mrs P's* [the guardian] *advice and made no order as to residence. Section 1(5) of the Children Act 1989 requires the Court to make no order unless making an order is better for the children concerned than making no order at all. Here, the parents are not, alas, capable of working in harmony. There must, accordingly, be an order. That order, in my judgment, requires the Court not only to reflect the reality that the children are dividing their lives equally between their parents, but also to reflect the fact that the parents are equal in the eyes of the law, and have equal duties and responsibilities towards their children.*

[163] http://www.bailii.org/ew/cases/EWHC/Fam/2004/142.html

Wall repeated Lady Justice Hale's observation that Shared Residence Orders do not diminish the parental role of the parent who previously had sole residence, 'a Residence Order in Mr A's favour would not, as a matter of law, diminish Mrs A's status as a parent, or remove her equal Parental Responsibility for the children', Wall showed how a prescriptive Shared Residence Order could be used to affirm the importance of a child's relationship with both parents and their equality in the eyes of the law even in a case involving false allegations against the father and where there was tremendous conflict. His reprimand applies to many cases,

> *This case has been about control throughout. Mrs A. sought to control the children, with seriously adverse consequences for the family. She failed. Control is not what this family needs. What it needs is cooperation. By making a Shared Residence Order the Court is making that point. These parents have joint and equal Parental Responsibility. The residence of the children is shared between them. These facts need to be recognised by an order for shared residence.*

In 2006 Australia introduced new legislation [164] making shared parenting the default arrangement following separation. The law has generated much criticism; critics say it has given fathers a false expectation that they will be guaranteed a 50/50 split, that it results in children being 'shuttled' across the continent, and that it doesn't give judges appropriate guidance.[165] Fathers' groups say the new laws haven't delivered what was promised.[166] However Wayne Butler, the secretary of the *Shared Parenting Council* (an umbrella organisation for a number of campaign groups), said fathers were alarmed that the laws would be repealed because they were 'an incredible improvement on where we were prior to the amendment',

> *The vast majority of cases are being settled well before they get to the Family Court for a determination. People don't read about the thousands of cases that are being settled amicably.*

Inevitably the media is dominated by the few cases which don't work, and ignores the many which do. Opposition to the new laws is vocal and well-funded, and it is possible the legislation will be rolled back. The experience doesn't show that shared parenting is wrong in principle, merely that legislation needs to be drafted carefully and backed up by services to children and parents and guidance to judges.

As we showed above, court-ordered joint custody arrangements can reduce conflict and result in happier children and more satisfied parents: Bender (1994) showed that re-litigation is rarer in shared custody arrangements, and compliance with orders is higher.[167] There is also important research from the US by John Guidubaldi to show that where states award shared residence there is a corresponding decline in the divorce rate.[168,169] Sole custody arrangements and the

[164] The Family Law Amendment (Shared Parental Responsibility) Act 2006
[165] Caroline Overington, *Family Law experts slate shared-parenting*, the Australian, 03 June 2009, http://www.theaustralian.news.com.au/story/0,25197,25579454-601,00.html

[166] Caroline Overington, *Fathers still chasing equal time with children*, the Australian, 04 June 2009, http://www.theaustralian.news.com.au/story/0,25197,25584040-2702,00.html
[167] Bender, W. N., *Joint custody: the option of choice*, Journal of Divorce & Remarriage, 21(3-4), 115-131, 1994
[168] Kuhn, R. & Guidubaldi, J., *Child Custody Policies and Divorce Rates in the U.S.*, 11th Annual Conference of the Children's Rights Council, October 23-26 1997, Washington, D.C; Brinig, M.F. & Buckley, F.H., *Joint Custody: Bonding and Monitoring Theories*, 73 *Indiana Law Journal* 393, 1998

higher child support payments associated with them provide strong incentives for divorce.[170] The parent who anticipates that they will gain control of the children is the one most likely to file for divorce. Take away that incentive and prevent the use of children as levers and the rate of divorce drops proportionately. Parents who are not guaranteed sole custody will be encouraged to make a greater effort to save their marriages.

Who are the most vocal supporters of America's National Organization for Women (NOW) in their campaign against shared parenting? None but the bar association, child psychologists, social workers, family law experts, judges, lawyers: all those, in short, who profit from high levels of divorce and conflict and the exclusion of fathers, and who fear the loss of income from the adoption of shared custody.

1.3.4. The inequality argument

There is an argument that treating parents as equal partners in court actually represents differential treatment; we might call it the argument from inequality, it goes like this,[171]

> *A contrived equality of outcome when persons come before the law in dissimilar positions would be tantamount to disparate treatment. It would require taking persons who were not equally situated and treating them differently in order to effect "equality." That's not what "equality under the law" means; in fact it's the anti-thesis* [sic] *of it.*

By 'not equally situated' the writer means a 'primary carer' mother with de facto custody and an 'absent' father desperately applying for contact. To achieve a shared parenting outcome from that position would require taking parenting time away from the mother and giving it to the father; clearly the two would not come away from the Court with the same experience, but this does not mean they were not treated equally, the law has merely protected their child's right to have two involved parents.

In fact, writers like these want mothers – a.k.a primary carers – to be treated differently by the courts from fathers,[172]

> *Primary caregivers* [read 'mothers'] *should have their care and responsibility for the child recognized by the courts and children should have the right to a secure and stable environment. Conversely there are some parents* [read 'fathers'] *who take no interest whatsoever in the upbringing of their children and have never formed a 'meaningful relationship' with their child, but after separation they apply for residency or equal contact as a means to evade their financial responsibilities or in order to maintain control over their ex-spouses and children.*

This allegation that fathers who apply for contact or shared residence are habitual abusers who ignore the best interests of their children

[169] John Guidubaldi, *Joint physical custody lowers the divorce rate*, Speak Out for Children, vol. 12, no. 4, 1997
[170] Ibid.
[171] This version is from feminist blogger Claudine Dombrowski
[172] Quoted from Australian group National Council for Chldren Post-Separation (NCCPS)

and pursue their own selfish interests by seeking to continue harassing and exerting power and control over their former spouses is tediously common .

The origin of such sentiments clearly lies in the feminism which teaches that men seek to dominate women through violence and other means such as financial control; this is why withholding or restricting financial support has been added to the definition of domestic violence. Applying for custody is perceived as a means to continue control established during the relationship and to minimise child support payment. There is no evidence for this allegation and most fathers are willing to pay; any excluded parent who has attempted to fight their way back to their child through the courts will recognise how grossly insulting and insensitive such a view is. In fact, it is the combination of unilateral divorce and sole mother custody which more often enable mothers to exert continuing control over fathers, extorting money by carefully restricting contact.[173]

The fact that fathers are statistically less likely to be the 'primary carer' (3% in the UK) justifies the belief of such lobbyists that the law should not treat them equally or as of equal importance in their children's lives. It is easy to see that advocating the unequal treatment of different sectors of society on the basis of statistical probability is unacceptable and dangerous – it is not for nothing that fathers' groups refer to their treatment by the courts as 'gender apartheid'. The law must instead be applied equally, regardless of gender, and based on a full understanding of the benefits conferred by shared parental care.

[173] Saul Levmore, *Joint Custody and Strategic Behavior*, 73 Ind. L.J. 429, 1998

1.3.5. The challenge of distance

The successful 2006 campaign in North Dakota against a presumption of shared parenting utilised a poster campaign – illegally paid for from public funds – depicting a confused looking child with a suitcase and the caption 'Where do I sleep tonight?' The equal parenting campaigner Stephen Baskerville commented, 'federal bureaucrats are now using taxpayers' money to strong-arm citizens from democratic decisions that, by relieving a serious social problem, threaten to render the bureaucrats redundant.'[174] The argument for 'stability' maintains that children cannot cope with living in two homes, or with the frequent moves between them. The evidence shows this to be false: children can deal very well with two homes, and the benefits outweigh the inconvenience, provided certain criteria are met,[175]

- The needs of the child must be prioritised, and children given a say in how arrangements evolve over time;
- There must be flexibility over arrangements, with supportive and cooperative parenting;
- Children must be able to feel settled and truly at home in both households.

[174] Stephen Baskerville and Mitchell S. Sanderson, *How HSS Bullies North Dakota Citizens*, 17 August 2006, http://www.humanevents.com/article.php?id=16538
[175] Professor Carol Smart, Dr Bren Neale and Dr Jennifer Flowerdew, *Drifting towards Shared Residence?*, Centre for Research on Family, Kinship & Childhood, University of Leeds, December 2003, http://www.canadiancrc.com/articles/University_Leeds_Shared_Parenting_DEC03.htm.

These arrangements will obviously work best where parents cooperate and where there is minimal conflict. Shared parenting does not work so well where the needs of children are secondary to those of their parents, where there is inflexibility over arrangements, or where children do not feel settled or are made to feel like lodgers in one parent's house.

Shared parenting is most difficult for children if they are made to feel that they must divide themselves exactly 50/50 between their parents and when there is a violent or angry response if they try to change arrangements, or if they know it will reignite conflict. Sometimes, of course, making an inflexible order is the only possible option if it is going to have any chance of working, and your best bet may be to try it for a time, and if it works then ask the Court to put in place something less rigid.

The academics Kelly and Lamb demonstrated[176] that for children under 2 or 3 the transitions between parents must actually be *more* rather than fewer in order to maintain continuity of relationships and security. As children grow older they can cope with longer separations from each parent, and toddlers can manage 2 consecutive nights away without distress. They argue that the importance of maintaining the vital relationships with both parents has been lost in the emphasis on the stability offered by one geographical home. Opponents present this as disruptive and confusing for children and we don't altogether disagree, children are flexible, however, and resilient, and the only alternative is immeasurably worse. When it works poorly shared parenting can stretch problems over years, and even at its best is of limited duration; as children become teenagers they find the nomadic lifestyle less than ideal, and the move to university or independence is frequently a relief to them.

By 2003 a Shared Residence Order could be used *prescriptively* where the parental homes were close together. In Re F (Shared Residence Order) [2003] 2 FLR 397 Lord Justice Thorpe went further by demonstrating that shared residence could also be appropriate where the parents lived far apart, in a case where the mother moved from Hampshire to Edinburgh in order to thwart contact,

> *The fact that the parents' homes are separated by a considerable distance does not preclude the possibility that the children's year will be divided between the two homes of the separated parents in such a way as to validate the making of a Shared Residence Order.*

Mr Justice Wilson concurred,

> *Will an order for shared residence be valuable to* [the children] *as a setting of the court's seal upon an assessment that the home offered by each parent to them is of equal status and importance for them?*

Lord Justice Wall's 2006 judgement in Re P (Children) [2006] 1 FCR 309 demonstrated how far judicial thinking had moved since 1989: the father's appeal against the decision of the trial judge was allowed on the grounds that an order for shared residence reflected the reality of the situation and that *there were no compelling reasons not to make*

[176] Joan B Kelly, Michael E Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, Family and Conciliation courts Review; Los Angeles; Jul 2000; Volume: 38 Issue: 3 : 297-311, Sage Publications.

it. A Shared Residence Order had at last become the *default* position:

> *Good reasons are required if a Shared Residence Order is not to be made. Such an order emphasises the fact that both parents are equal in the eyes of the law, and that they have equal duties and responsibilities as parents. The order can have the additional value of conveying the court's message that neither party is in control and that the Court expects parents to cooperate with each other for the benefit of the children.*

1.3.6. Non-biological parenting

The next stage in the development of shared residence, marked by two important cases, was to make it an acceptable order when the parent in whose favour the order was made was not biologically the child's parent.

In such a case a Parental Responsibility Order on its own is not possible and PR can only be conferred by a Residence Order. The first case was **Re G (Residence: Same Sex Partner) [2005] EWCA Civ 462**, [2005] 2 FLR 957. This case concerned two girls conceived through anonymous donor insemination within a lesbian relationship. The biological mother intended to relocate with the children to Cornwall to move in with her new partner. The appellant partner (Miss W) applied for a Shared Residence Order as the only way by which she could acquire PR for the children. Lord Justice Thorpe granted the order,

> *But perhaps more crucial for me was the* [lower court] *judge's finding that between the first and second days of the hearing the mother had been developing plans to marginalise Miss W… The CAFCASS officer had expressed a clear fear that unless a Parental Responsibility order was made there was a real danger that Miss W would be marginalised in the children's future. I am in no doubt at all that, on the judge's finding, the logical consequence was the conclusion that the children required firm measures to safeguard them from diminution in or loss of a vital side of family life.*

Within a month the biological mother sought her former partner's approval for the move to Cornwall; the partner refused. The mother moved the children anyway, in secret and in clear breach of the Court Order.

Miss W commenced proceedings both to locate the girls and for sole residence. CAFCASS recommended against this and for defined contact instead, but it was a 'fine balance' and the reporter had little confidence that the mother would obey future Court Orders. The judge, Mrs Justice Bracewell, had no confidence in the mother; she rejected the CAFCASS recommendation and preserved the Shared Residence Order while reversing the parenting time allocated to each parent.

The mother appealed; in the House of Lords Baroness Hale reversed the reallocation of time in Bracewell's order.[177] She also made an order for Family Assistance, and warned the mother against further

[177] http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060726/child-1.htm

breach. Hale quoted from an Australian case, Hodak, Newman and Hodak (1993) FLC 92-421,

> *I am of the opinion that the fact of parenthood is to be regarded as an important and significant factor in considering which proposals better advance the welfare of the child. Such fact does not, however, establish a presumption in favour of the natural parent, nor generate a preferential position in favour of the natural parent from which the Court commences its decision-making process … Each case should be determined upon the examination of its own merits and of the individuals there involved.*

The importance of the case is that it establishes the legitimacy of making a Shared Residence Order in respect of a *non*-biological parent – a social and psychological parent – in order to confer Parental Responsibility.

The second case, **Re A (A Child: Joint Residence/Parental Responsibility) [2008] EWCA Civ 867** revolves around paternity fraud. A father had brought proceedings for and obtained a Parental Responsibility Order. A CAFCASS report recommended joint residence and defined staying contact. The mother's response was to cast doubt on paternity and a DNA test duly confirmed that the father was indeed not the biological father. This meant he no longer had PR and could only acquire it again through a Residence Order. The mother was unable to accept that the father should have PR or have any say in his child's upbringing.

The case became protracted and proceedings persisted for more than 4 years. The mother planned to move away, threatening to disrupt what was by now regular contact. The father obtained a Prohibited Steps Order and sought shared residence on the grounds that he would otherwise be marginalised; the mother objected.

In December 2007 the Court awarded joint residence with defined generous contact and PR, but in return allowed the mother to move away. The mother was also barred from introducing the child to his biological father without the consent of the Court, and both parties were barred, under **Section 91**, from making further applications.

The mother appealed on two primary grounds: firstly, that in the order the Recorder had erred in principle and in law, had inappropriately linked the father's PR to the mother's relocation, had unduly favoured the 'social and psychological' father over the biological mother and thus undermined the mother as biological parent. Secondly, the Court had not sufficiently considered the child's biological parentage, perpetuating a lie and excluding the biological father (who did not wish to be involved in the child's life).

In rejecting the appeal, the President, Sir Mark Potter, emphasised that the Shared Residence Order was made, not to give the father undue rights – the mother remained the primary carer, but to affirm the father's responsibilities and to ensure he was not marginalised; it was the only legitimate means by which to confer Parental Responsibility on an individual who could not otherwise apply for it. Potter also assessed the case law and current policy on Shared Residence Orders, and some of his points are included here. Potter makes an important distinction,

> *The fact is, Mr A is not H's father or parent either in common parlance or under any definition contained in the Children Act or other legislation. He is not a father by biological paternity or adoption, nor a stepfather by marriage. He is a person entitled, by reason of the role he has played and should continue to play in H's life, to an order conferring Parental Responsibility upon him. He is thus a person who, jointly with the mother, enjoys the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to that child (see s.3 (1) of the Children Act 1989) but he does not thereby become the father of that child.*

Potter went on to summarise the status of the Shared Residence Order:

> *The making of a Shared Residence Order is no longer the unusual order which once it was... It is now recognised by the Court that a Shared Residence Order may be regarded as appropriate where it provides legal confirmation of the factual reality of a child's life or where, in a case where one party has the primary care of a child, it may be psychologically beneficial to the parents in emphasising the equality of their position and responsibilities.*

This would seem to contradict Hale's opinion in Re A [2002] that 'a Residence Order is about where a child is to live'. Both cases show that a Shared Residence Order is now the most appropriate order to make when a parent is trying to marginalise the other, regardless of conflict, regardless of geographical separation, regardless of one parent continuing to be the primary carer and regardless of whether or not the other parent is the biological parent. Biology is a factor and an important factor, but it should not be allowed to trump the child's welfare. There is still, however, some way to go before the judiciary and CAFCASS willingly accept that a *presumption* of shared residence is in the best interests of the child, and at present these orders are being made predominantly for older children and where there is an established history of shared care.

1.3.7. More-or-less equal

Perhaps we should end this discussion by dismissing the myth that Shared Residence Orders are appropriate only where the care of the child is shared in a certain, minimum, ratio. In **Re F (Shared Residence Order) [2003] EWCA Civ 592**, [2003] 2 FLR 397 Lord Justice Wilson observed that such calculations were usually of limited value; he repeated this observation in **Re W (A Child) [2009] EWCA Civ 370**, a case in which a child would only be spending between 22% and 24% of her nights with her father. The force of a Shared Residence Order is to confirm that parents have equal status and responsibilities.

1.3.8. Conclusion

Shared parenting is not a panacea, it works least well when court-ordered against sustained resistance from one parent and best where parents put aside their differences and cooperate. One of the problems with shared residence is that non-resident parents are forced into making the application in order to avoid the sole-

residence-plus-contact arrangement which so often leads to the complete breakdown of the parent/child relationship.

Many fathers don't actually want shared residence, and their working routines can make it impossible, obliging them to give up their jobs, but they are forced into residence orders which will permit them more time with their children than they really want or need because the contact orders they already have, with which they would be very satisfied if they were allowed to stand, are being ignored, disobeyed and not enforced.

This is the consequence of the adversarial nature of the courts, and it leads to undue pressure on the other parent, and sometimes to increased conflict. You may even feel it is necessary to apply for *sole* custody merely to maintain any sort of relationship with your child. Also be aware of Sir Mark Potter's judgement in Re A above that a shared residence arrangement does not preclude the elevation of one parent over the other as the primary carer.

As it becomes a more common order there is evidence that many fathers who obtain shared residence find themselves in much the same position in practice as a non-resident father with a Contact Order: handovers are fraught or don't happen, and the other parent continues to play a 'gate-keeping' role. Cynically, it means they can be counted in the statistics as resident parents. Where shared parenting orders are not obtempered, a parent paradoxically lacks the options available for enforcing Contact Orders. Nevertheless, it is infinitely better than the alternative: the partial or total loss of one parent, which is the only other solution on offer and is what is meant, ultimately, by 'stability'.

If shared parenting seldom works very well in the present covenant, and sometimes breaks down after a time, this is because one parent, usually but not invariably the mother, can always threaten the other with a return to litigation, a denial of contact, and sole residency. Legislative reform must therefore remove the opportunity for this threat, and come down very heavily indeed on any parent who breaks a shared parenting agreement.

CHAPTER 2: DIVORCE

> *Ha, yes, divorce. From the Latin word meaning to rip out a man's genitals through his wallet.*

US comic Robin Williams

> *Almost every dysfunctional child is the product of a broken family.*

Lord Justice Coleridge[178]

2.1. Warning!

As a parent you need to recognise that having a child is a life-long responsibility which necessitates some degree of life-long cooperation and communication with the other parent, regardless of any personal differences you may have. Once you have a child a 'clean break' divorce is no longer possible or responsible, so you need to consider very carefully if divorce really is the best thing, not for you, but for your child.

It is the failure to understand this which generates so much of the conflict in contested contact and residence cases.

Children are not weapons with whom to beat the other parent, no matter what he or she may have done to you; they are not bargaining chips with which to extract more child support from your spouse, or more benefits from the State; they are not a right. They are a privilege and a blessing, and they are your responsibility. If you wreck their childhoods because you can't resist battling with your former partner, and they grow up without an education, or with a mental illness, or a drug habit, or join a gang, or mug old ladies, or become pregnant in their teens, they will have no one to blame but you.

[178] Lord Justice Coleridge, keynote speech delivered to Resolution National Conference, *Family Life – Family Justice – Fairness*, 5 April 2008

There is never a good time for divorce, and it is a myth that if you divorce you should do so when children are young. Divorce will damage your children, probably irreparably, and the younger they are, the worse the damage will be.[179] The reality is that children experience better outcomes if their parents stay together, even in an unhappy marriage (provided there is no violence), than if their parents divorce.[180] The idea that divorce is a liberating experience, releasing women from abusive relationships, is feminist propaganda which puts the narcissistic desires of adults before the needs of their children.

> *First, marriages do not simply "break down" by themselves. Legally, someone – and it is usually one – consciously ends it by filing official documents and calling in the government against his or her spouse... some 80 percent of divorces are unilateral.*[181]

Let's be really clear about this: divorce is the breaking of a contract, the abrogation of vows, the abandonment of responsibility, the gross betrayal of those you should hold most dear. It is a terrible, terrible thing.

Because of the 'no-fault' concept that divorce is no longer the fault of either partner, the innocent parent who didn't want the divorce is held *equally* responsible for ending the marriage and for violating the contract. It ignores the fact that one parent has put their selfish desire to opt out of the marriage before the basic right of their children to a family. This creates the illusion that the divorce epidemic is caused by warring parents whose immature and irresponsible behaviour entitles the courts – and through them the State – to assume parental authority. Lawyers no longer need to trouble themselves about justice, about which partner is responsible for the breakdown of a marriage, since now both partners can be held responsible. Thus, far from eliminating the concept of fault, the new laws *impose* fault on the innocent party, who can be summoned to Court despite having done nothing criminal and under a presumption of guilt for which there can be no defence.

The disenfranchised parent who is angry and unwilling is regarded as uncooperative and must be subjected to Maoist re-education to accept the falsehood that it isn't the system which is dysfunctional but he as a parent; he isn't taught about the harm divorce will do his children or the social importance of keeping families together: he is indoctrinated into acquiescence to unilateral divorce. The Court will then in effect reward the defaulting partner usually with possession of the house, much of the previously shared wealth and, best of all, with the children.

Which partner most often petitions for divorce? Official Government figures put the proportion of divorces initiated by wives at about 75 or 80 per cent, but this is misleading, according to surveys by the accountants Grant Thornton women file for divorce in between 91% and 94% of cases.[182] It is also wives who most often *instigate*

[179] See, for example, Israel Kolvin et al., *Social and Parenting Factors Affecting Criminal-Offense Rates: Findings from the Newcastle Thousand Family Study (1947-1980)*, British Journal of Psychiatry 152 (1988): 80-90

[180] Barbara Dafoe Whitehead, *The Divorce Culture,* Knopf, 1997; Goldschneider, Frances K. and Linda J. Waite, *Alternative Family Values*, Writing in the Disciplines, Ed. Mary L. Kennedy, William J. Kennedy and Hadley M. Smith, Uppersaddle River, NJ: Prentice Hall, 2000

[181] Stephen Baskerville, *The politics of family destruction,* November 2002

[182] E.g. Grant Thornton, *Boom or bust for divorce?,* Summer 2009

divorce.[183] We must also understand *why* it is that one spouse more than the other should petition for divorce; what prompts a party to make that irrevocable step? In 2000 professor of law Margaret Brinig and economist Douglas Allen examined 46,000 divorce cases (one of the largest studies ever undertaken on divorce) [184] and examined the role played by the expectation of child custody,

> *Children are often the most valuable assets in a family. As such, custody is expected to be a critical issue in divorce filing behaviour.*
>
> *It is expectations of custody that drive divorce filing. By making a preemptive filing, the wife may be able to secure rights such as child or spousal support that require court enforcement. When the wife files, she is often given temporary custody of the children. Temporary custody, like possession, tends to be 'nine tenths of the law' and plays a role in the assignment of permanent custody, especially where the divorce does not occur for some time.*

Experience shows that when a father makes a pre-emptive filing it is he who will often secure custody. The best advice available to a father therefore is often to make that first move before the mother does. Brinig and Allen went on to investigate how common in divorce cases this strategy is; out of 21 variables they found overwhelmingly that **the factor determining which partner filed for divorce was the expectation of child custody**. Even when other variables are set to their maximum, adding the probability that the wife will get custody increases by **more than 7 times** the likelihood that she will file for divorce.

> *Divorce without custody means giving up a large part of the joy of being a parent—while continuing the financial responsibility for the child. The interesting feature of the custody variables is how large they are. These variables dominate the regressions and are completely robust to changes in samples. Despite neutrality in the custody laws, it remains true that judges are inclined to award children to women.*

Following these findings Brinig and Allen made this recommendation to law makers,

> *If it is custody outcomes that most influence divorce filings, changes in custody rules (or their likely outcomes) rather than in divorce grounds, should most shape the patterns of both marriage and divorce. In particular, this could take the form of a presumption of joint custody… An appropriate custody rule mitigates the incentive for one party filing for the purpose of gaining unilateral control over the children and therefore the other spouse.*

Holding a marriage together however, for the good of your children, requires two responsible, committed adults. If your spouse is determined to divorce you, or puts you in such a position that divorce is the only option left open, then you will not be able to avoid divorce, and you will need this manual to guide you through the process.

[183] Sanford L. Braver, Marnie Whitley, & Christine Ng, *Who Divorced Whom? Methodological and Theoretical Issues*, 20 J. Divorce & Remarriage 1 (1993).
[184] Margaret F. Brinig & Douglas W. Allen, *These Boots are Made for Walking: Why Wives File for Divorce*, The American Law and Economics Association, 2000

2.2. Getting Divorced

Happy families are all alike; every unhappy family is unhappy in its own way.[185]

2.2.1. Before you start

If you are a father you need to avoid divorce at all costs; you are better advised to try to reach some form of reconciliation. Remember that divorce cruelly damages children. It causes even more damage than the legal battle for custody which often follows. Children are happier and do better with parents who don't necessarily get along terribly well than they do in broken homes. If it is at all possible try to patch up your marriage; don't divorce, at least until your children are much older. Try to concentrate on putting their interests first.

- The chances are that when your child's other parent had divorce papers served on you it was the first you knew that there was a serious problem in your marriage. You will be shocked, distressed, confused, angry, hurt. Try to overcome that. You need to act very quickly and decisively from now on.

- If you are luckier and have some warning then throughout the period of final co-habitation with your spouse do not engage in any verbal or physical confrontation with him or her. PERIOD. If the situation becomes volatile, do not engage in any discussions about legal or financial issues. If you do, you put yourself at the risk of a Court Order to have you thrown out of the house and possibly restrained from going anywhere near your spouse, your property and, possibly, your child. If your spouse becomes confrontational, walk away and avoid contact.

- Ensure that the only dialogue between you is about the care and well-being of your children and the day-to-day running of your home. If you must communicate directly with your spouse regarding matrimonial issues, do so in a written note. You can organise your thoughts better that way and avoid verbal jousting. Don't use inflammatory language: stick to the facts. Date the note and write 'Without Prejudice' at the top (this protects you from later use of your note against you). And keep a copy of it for your files. If you receive a letter on which 'Without Prejudice' is written you should not show it to the judge.

- Throughout this period of final co-habitation with your spouse, eliminate, or at the very least, reduce, your consumption of alcohol. If you have a drug or alcohol problem, GET HELP IMMEDIATELY, otherwise you will be dead in the water. Alcohol – and most drugs – reduce your inhibitions and may make you more aggressive and thus in danger of confrontation with your spouse. Later, when you come down from your high, you will suffer from depression which will impair your ability to think clearly and may make you susceptible to suicide. In many cases of violence, murder and suicide in marital disputes, alcohol is a contributory factor. Furthermore, if there is to be conflict later over residence and contact, your spouse will almost certainly use any abuse of alcohol or drugs against you. If these allegations are made the Court will

[185] Leo Tolstoy, *Anna Karenina*, 1873-77

have to order a **hair strand test** which will reveal drug or alcohol consumption, so stop NOW.

- If you need it, and you probably will, get emotional counselling. There is no stigma attached to getting help for the stress, anxiety and depression that almost everyone experiences during the ordeal of a high-conflict divorce. Have your family GP recommend a counsellor or check your employment health benefits to see if referral to a counsellor is available to employees. If you are a member of an organised religion, your vicar / priest / rabbi / imam or affiliated lay counsellors may provide assistance.

- Transfer all money from joint accounts to your own sole account and don't tell your spouse. This sounds underhand, but if you don't the chances are that he or she will clean out the accounts before you do. This is really, really important. Have your spouse's name removed from all joint credit cards for which you are responsible; get the cards and destroy them. Again, if you don't you will find yourself paying for your ex's legal team while you are forced to represent yourself. Don't be unreasonable about this, and make sure your children are adequately provided for, or that will be used against you as well, but you need to protect yourself, and many parents (usually fathers) find themselves homeless and with their bank accounts locked or cleared out before they know what's hit them.

- If you have moved out, don't pay the bills on your house unless ordered to do so by the Court: your goal is to force your spouse to accept a reasonable settlement.

- Plan your legal action sooner rather than later. We don't advise that you use a solicitor, but if you do take that route be prepared for the fact that it will cost you a considerable amount for a lawyer to begin working on your case. Hourly rates start at about £180 and cases can last years. Make sure your lawyer is an experienced family law specialist and not just someone who does part-time family, part-time conveyancing, etc. Ask your solicitor if he/she is aware of the failings of the Family Court system and if he (we'll assume it's a man) is willing to fight for your rights as a parent and not be intimidated by biased or lazy court officials.

- For your first meeting with your solicitor or McKenzie Friend be prepared with a written outline of the issues of your case. Don't make this a novel about your marital breakdown; just stick to the cold, hard facts. Prepare a written agenda for all meetings, with all issues, questions, etc., spelled out in detail. Write down all responses and action items. Be prepared to do any legwork for him that you can (document searches, brief preparations, etc.). Use his time wisely: the meter is ticking all the while you are sitting in meetings with a solicitor or consulting on the phone and you will be paying upwards of £3 per minute. And remember two things: he works for you so be demanding; and he will only act on your instruction, so you must make any decisions yourself with his guidance.

- Start and maintain in chronological order a comprehensive and well-organized file of ALL documents, memos, letters, briefings, affidavits pertinent to your case; we'll look at this **Chronology** in detail later. Your file is critical for referring to past actions, issues, details. Take all relevant files with you for meetings with

your lawyer – this is your '**Bundle**'; and take the originals plus a second set of all relevant files with you to court appearances as back-up in case your lawyer does not have the appropriate ones with him.

- Micro-manage your money. Legal fees and, inevitably, child support payments will be major financial complications you will have to deal with. Go on an austerity budget. When you finally separate, you should be aware that you may be responsible for financing two households. Start a war-chest of any and all money you can squirrel away. Line up resources for borrowing because, eventually, you are going to have to solicit loans.

- Be prepared for the 'equalisation of family assets'. This means that, even though your spouse may not have worked outside the house a day in any paid employment (parenting and housekeeping are considered to be sufficient contribution to the marriage), he or she is nevertheless due 50% of all the assets accumulated during the marriage. That is: he or she gets half the proceeds of the sale of the house and properties, half the savings, half the investments, half the family liquid assets, half your employment pension, half the value of all vehicles and half the furnishings, etc., of the home accumulated during the marriage. If your spouse works, all their assets, including savings they may have accumulated, will be included in the division of assets.

- A note about the separation date: this is a critical date for figuring out the equalisation of assets. In general, you both keep whatever assets you brought to the marriage. However, all assets accumulated between the date of marriage and the date of separation are split 50/50. The separation date is typically the date that one of you leaves the matrimonial home. The status of that date may change if the one who left returns for any amount of time. A separation date may be established while you are still together. Often, it's the date that you stop sleeping together in the same room, but it may require the added proviso that you have stopped doing things together as a family.

2.2.2. Disputes

Since April 2011 any disputes which arise as a result of divorce or separation have had to be resolved where possible through mediation. Couples who can't agree over the division of assets or arrangements for children have to go first to an accredited mediator.

Mediation cannot be compulsory without new primary legislation, so while we wait for that, if couples refuse mediation or if the mediator thinks they are unsuitable they will then be enabled to go on to Court. The mediator will provide the couple with a report or certificate.

At present there is not the number of mediators available to take over from solicitors as the 'first port of call' for disputing partners; many solicitors will retrain rather than lose their jobs, but until that happens there will be huge delays while couples wait for mediators to become available, and there will be pressure on mediators to pass couples on to the court system.

Legal aid will be available for mediation via the Legal Services Commission which presumably will issue certificates to mediators in the same way they now issue them now to solicitors.

If there is domestic violence or a child protection issue, couples will be able to bypass mediation, and where domestic violence is alleged and proven the putative victim will be entitled to legal aid. It isn't clear how this determination will be made or at what stage. It isn't clear at what point CAFCASS will become involved.

2.2.3. Applying for divorce

Divorce proceedings are governed by the **Matrimonial Causes Act 1973**. Civil Partnerships are ended under the **Civil Partnership Act 2004**. If you are really in no doubt that divorce is your only option you have to demonstrate to the Court that your marriage has broken down 'irretrievably' – that is, that one or both of you feel that you cannot stay married to each other. **Note**: you cannot petition for a divorce until one year after the date of your marriage.

You demonstrate irretrievable breakdown by proving one of five 'facts':

1. Your spouse has committed adultery and you find it intolerable to live with him or her.

   You prove adultery either because a child has been born as a result, or by your spouse admitting it. If he or she won't cooperate and you can't prove the adultery you will need to use another 'fact'. Unreasonable behaviour is very simple to prove, so use that; don't even think about hiring a private detective, there's no need. If you carry on living with your spouse for more than six months after you find out about the adultery, you will not be able to use this as your 'fact'.

It is important to understand what adultery is and what it isn't. Adultery is defined as consensual sexual intercourse between a married person and someone of the opposite sex other than their spouse. If you have consensual sexual intercourse with someone of the same sex it is not adultery. If you are in a civil partnership you cannot commit adultery and thus you cannot use this as your 'fact'.

Even if you separated some time ago, if you are still married intercourse with another is adultery. An indignant spouse recently wrote to the Court denying the adultery of which his wife had accused him in her petition. He had, he said, left his wife a long time previously, and had only met the co-respondent recently. The Court naturally accepted the denial as a confession. On the other hand, if you want to divorce on the basis of adultery you must do so within 6 months; if you continue to live together you have condoned the adultery and cannot use this as your fact.

In Scotland – but not in England or Wales – it is a defence that the cuckolded husband was aware of the adultery and condoned it. The term for this is *lenocinium* which derives from the Roman *lex Iulia de adulteriis*. In Rome a husband who was aware of his wife's adultery was obliged to divorce and prosecute her within 60 days. If he failed to do so he was guilty of acting as her pimp and could himself be prosecuted. A Scot must also prove 'physical contact with an alien and

unlawful organ' – divorce on the grounds of adultery is rare in Scotland. A charming English word for a man who tolerates being cuckolded is 'wittol'.

2. Your spouse has behaved in such a way that you cannot reasonably be expected to live with him or her.

   This covers an infinite variety of behaviour, including adultery if your spouse won't admit to it. Think about the things that have made your spouse impossible to live with. These are summed up in the divorce petition in a few short paragraphs; include the first and most recent events, and the most serious. As with adultery, you cannot rely on single incidents that took place more than six months before you file your petition if you have lived together for more than six months since the incident.

   This is all a bit of a pantomime and it doesn't really matter who says what about whom. This is 'no-fault' divorce in all but name.

3. Your spouse has deserted you for a continuous period of at least two years immediately preceding the petition.

   Desertion means your spouse has left you without your agreement, and without a good reason. Despite what our fool of a Prime Minister thinks, this is very rare.

4. You have lived apart for a continuous period of at least two years immediately preceding the petition and your spouse consents to the divorce.

   This is often called 'no-fault' divorce because the first three 'facts' involve an allegation of fault. You can have had periods of living together as long as they do not add up to more than six months and you have been apart for at least two years altogether.

5. You have lived apart for a continuous period of at least five years immediately preceding the petition.

   Your spouse does not need to agree to this. He or she cannot defend this petition, but can ask the Court not to grant the final decree because of major financial or other type of hardship.

Facts 1 and 2 are the most popular because with all the others you need to have lived apart for more than two years. If you intend to file a petition based on your spouse's behaviour or adultery, it makes sense to discuss this with him or her first; unless a child has been born the adultery must be admitted, preferably in a Confession Statement. If you do this, you can make sure that the petition will not be defended, and this will save you legal costs.

You may hear people talking about 'no-fault divorce'; technically we do not yet have a fully 'no-fault' system in Britain, though see our discussion of this in our document *Family Justice on Trial*. What actually happens is that both parties are assumed to be at fault; fault must still theoretically be proven unless you are prepared to wait; but because the usual qualification for divorce, 'unreasonable behaviour', is so vague, this requirement is no more effective at preventing divorce than the supposed safeguards on abortion, and divorces are in effect rubber-stamped.

There doesn't seem to be a problem in need of solution: few petitioners for divorce have any difficulty finding a fault, and it is rare to defend a divorce once fault has been alleged, though we'll have more to say on this point later. This has not prevented lawyers – such as the Family Court judge Sir Paul Coleridge[186] – from demanding the full introduction of 'no-fault' divorce, i.e. divorce on demand. At a time of stagnant or falling divorce (because of falling marriage) it would provide a little boost to lawyers' dwindling incomes.

Most divorce petitions are filed by wives; it is much rarer for a husband to do so; the procedure is the same. If your situation is simple you can arrange a 'do-it-yourself' divorce; contact your local County Court to get the guidance booklets and forms you will need – there is a list of County Courts in **Appendix 1**. Hearings should normally take place in the court closest to the primary carer's home (or petitioner's home if you have no children); if you open proceedings in a different court they may be moved at the respondent's request which will delay matters while papers are transferred. Phone the Court first to check that it has a divorce section. Its number will be listed in the phone book under 'Courts'. You can also download the forms and booklets from the **Ministry of Justice website** which also provides a **Court Finder** service.

First of all you will need to download and complete **Form D8**, the Divorce Petition. Also download the **associated notes**, and refer to them when you fill out the form. Note that these forms assume you are the wife, since it is wives who most often petition for divorce. If you are the husband you may need to change some of the wording.

[186] E.g. Mured Ahmed, *Breakdown of family 'to blame for all society's ills'*, The Times, 5 April 2008, http://women.timesonline.co.uk/tol/life_and_style/women/families/article3671857.ece

2.2.4. Filling out the petition

Enter your name and tick the order for which you are applying.

Do not write anything else on this page.

1. Enter your name – the **petitioner** – and the **respondent**'s name in full. Give your addresses, dates of birth and occupations. You must then complete the following sections; in each case delete the word '*except*' if there are no details to enter:

2. Enter:

   - The date of your marriage or civil partnership.
   - Your and your partner's names as they were at the time of the marriage or civil partnership;
   - The place at which you were married as it appears on the certificate.

3. The Court can only deal with your application if it has jurisdiction; in this section you must confirm that it has.
   Indicate whether you were married or civil partners.
   Give the address where you last lived together.
   Tick the appropriate box relating to why the Court has jurisdiction

   The Court has jurisdiction if both of you are 'habitually resident' in the England and Wales jurisdiction. Habitual residence is the

country in which you voluntarily live for your work and where you conduct your family life. You must spend a considerable amount of time here. England and Wales must have been your habitual residence for a year before issuing the application.

Alternatively you must show that one of you is 'domiciled'' in England and Wales; your domicile is the country you consider to be your permanent home. You must be domiciled in England and Wales on the date the petition is issued.
There is an alternative rule for civil partnerships if the civil partnership was registered in England and Wales and if the Court considers it to be in the interests of justice to assume jurisdiction.

4. If there have been any other relevant proceedings give the name of the Court, what the proceedings were, and details of any Court Order including dates. If the proceedings were abroad state, 'except as in paragraph (9)'.
   State if the application is based on 5 years' separation. Give details here of arrangements made for the children.

5. State whether you are applying for divorce, dissolution or judicial separation.
   You must tick one of the 5 facts which show that the marriage has broken down irretrievably.

6. Here you need to give some more detail of the fact; one or two sentences will do:

   - **Adultery** – give dates, location and other relevant details if known. You do not have to name the **co-respondent** unless you want to claim costs from him or her.

   - **Unreasonable behaviour** – give dates, location and details. The first and most recent incidents and the most serious should be sufficient; you only need to show the marriage has broken down irretrievably. Number your paragraphs.

   - **Desertion** or **Separation** – give the date and brief details of the circumstances.

7. Give the full names and dates of birth of any children born to the marriage, or treated as children of the family (see **Glossary**).
   Tick whether or not you are attaching a statement of arrangements for these children.
   Give the full names and dates of birth of any children who are not children of the family (e.g. children who have been born to the mother illegitimately).

8. State whether you want the Court to provide any special assistance or facilities when you attend.

9. Provide details of how you want to be served. If you are represented by a solicitor service will be to him or her.
   Provide the respondent's address for service.

10. **The Prayer** (this term dates to when divorce was a matter for the ecclesiastical courts):

Tick according to whether you want dissolution or judicial separation.
You may want the Respondent to pay the costs, or the Co-Respondent in an adultery case. You can't apply for costs if you are divorcing after 5 years' separation, and you cannot apply once the decree has been granted.
Financial Orders (formerly Ancillary Relief) – this is where it gets complicated. If in doubt, include the claim, you do not have to pursue it. If you don't include the claim you will need leave of the Court later if you do want to pursue. The Court can always dismiss claims. Arrangements for children are usually dealt with by the CSA/CMEC.

You then sign and date the petition.

Fill out the details on the final page – this is known as the '**Backsheet**' and protects the petition document; it faces outwards so that it can be read without opening the document.

Take or send the petition to your nearest divorce County Court together with the fee (see **Court Fees**) and your Marriage Certificate. If there are children you will need to complete a Statement of Arrangements. The application must also be served on the respondent and any co-respondent (see **Section 6.2.7** for more detail).

2.2.4.1. Arrangements for children

Where there are dependent children the Court will not allow the divorce to proceed unless it is satisfied by the arrangements made for them. This is the Court's first responsibility under section 25(1) of the Matrimonial Causes Act. You will therefore need to complete the Statement of Arrangements for Children on **Form D8A**. It is very straightforward to complete.

The Court must consider the welfare of any 'child of the family', regardless of whether that child is yours biologically. Parents' financial responsibility for their children continues beyond the age of 16, and so the Court will take that into account, even if the child is at university. The Court is obliged to consider these arrangements and may delay the Final Order until arrangements are agreed. It is obviously far better that you should agree these matters than have the Court decide them for you.

The assumption made in the form is that you are the wife, the petitioner for divorce and your children's primary carer. The father/respondent/absent parent does not need to complete a separate form, and should sign the form completed by the petitioner if in agreement.

Guidance on filling out **Form D8A** is available in **Leaflet D185**, *Children and Divorce*.

Fill out the heading with the name of the Court, your full name and your spouse's full name and the reference number of the case.

1. Enter the names and dates of birth of any children of the marriage.

2. Enter the names, dates of birth and relationships to yourself and the respondent of any 'children of the family'. That means step children and children whom you regard as yours even though they are not biologically related to you.

3. Enter the names and dates of birth of any children who are *not* children of the family, such as children born to a wife as a result of her adultery.

4. Give the address(es) of the home where the children now live.
Provide the number of rooms in the house.
If the house is rented give details.
Give details of all other people who live in the house and their relationships to the children in Question 1.
Describe any foreseen changes to these arrangements.

   If you don't have any of this information state that it is 'not known'. If the children live equally in two homes give details of both, otherwise only give details of their primary home.

5. Give details of the children's places of education.
Give details of any special educational needs your children have.
If there are school fees to be paid, give details.
Describe any foreseen changes to these arrangements.

6. Give details of which parent provides regular childcare.
If they work give details of their hours worked.
Give details of any other carer for the children.
Give details of who shall care for the children during school holidays.
Describe any foreseen changes to these arrangements.

7. Give details of any amount of child support you receive from your spouse.
If the arrangement is made under a Court Order give details and the case number.
If the arrangement is made through the CSA/CMEC give details.
Is the question of maintenance settled?
If not explain whether you will be making a claim through the Court or through the CSA/CMEC.
If you are paying child support to the other parent you will need to change the wording and indicate how much you are paying.

8. Give details of contact between the children and the non-resident parent.
Give details of overnight staying contact.
Describe any foreseen changes to these arrangements.
If you are the contact parent you will need to alter the wording.

9. Give details of the children's general health; only list serious problems.
Give details of the children's special health needs.

10. If the children are in care or under social services supervision give details.
    If the children are on the Child Protection Register give details.
    Give details of any court proceedings regarding the children, other than for child support, and attach copies of the orders.

Be careful how you fill out the form; the Court will be looking for gaps, for example in the child's education, or times when the child is not being looked after by an adult, or an insufficient number of bedrooms, or for other causes of concern.

Part III invites you to use the services of a 'conciliator'. This really means a mediator – see the difference between conciliation and mediation in **Section 4.1.** You should answer 'Yes' unless there are very good reasons, such as domestic violence, why you should not. You must then sign and date the form.

2.2.4.2. Agreeing the petition

You are best advised to send the Petition and Statement of Arrangements for Children to your spouse and ensure that he or she agrees to it and will not object to the details of adultery or unreasonable behaviour and defend the divorce. That will obviously result in extended litigation and expense. You can still file the forms with the Court if he or she doesn't agree or sign.

2.2.4.3. Filing the documents with the court

You need to file with the Court:

1. The Divorce Petition, Form D8;

2. Additional copies for the Respondent and Co-Respondent if appropriate – you must ask the Court to serve these;

3. The Statement of Arrangements for Children, Form D8A;

4. Your marriage certificate or certified copy. If this is not in English you will also need a certified translation.

Keep copies of **everything**. If there is further litigation, or you need to commence proceedings for contact or residence, you will need all your documents filed and easily accessible. Where possible scan them and keep electronic copies in case you need to make further hard copies.

You can file the documents by post or take them to the Court yourself. You will need to pay the **appropriate fee**.

2.2.5. Claiming costs

The cost of a divorce can vary greatly, depending on how complicated your case is and how far you and your spouse can agree about things. Most solicitors' charges are based on how much time they spend on

your case. Always ask for an estimate of costs when you first see a solicitor, but be prepared for this to change as your case develops.

Apart from paying your solicitor if you have one, you will have to pay court fees if you are the petitioner (the person wanting the divorce), unless you:

- are specifically exempted (that is, the Court can choose not to make you pay the fees, if it thinks you cannot afford them); or
- get public funding ('legal aid').

There may be other fees (solicitors call them 'disbursements') for things like property valuations and, where appropriate, barristers' fees.

You may be able to get part of your costs back from your spouse if you both agree, or if the Court orders it, but it is unusual for the Court to order your spouse to pay your costs, and you will generally not get back all your costs.

If your spouse is the petitioner it is much more likely that you will have to pay the costs, either directly, or indirectly through ancillary proceedings when your spouse's costs will be added to the settlement. Generally costs are paid by the party who is considered at fault, so if you admit adultery or unreasonable behaviour on the Acknowledgement of Service (see below) you may end up having to pay the petitioner's costs. Until we have a no-fault divorce system you will need to state that the breakdown of the marriage was solely or equally the petitioner's fault, and the Court may then make no order for costs or call you to Court so that both arguments can be considered.

If you qualify you can apply for public funding to cover the divorce proceedings (called Legal Help); and the proceedings over money or children's issues (called Approved Family Help and Legal Representation). You can also obtain public funding for mediation. The Citizens Advice Bureau should be able to advise you on help with legal costs.

2.2.6. What happens next

The old terms 'Divorce Nisi' and 'Divorce Absolute' have recently been replaced in the Family Proceedings Rules with the terms 'Conditional Matrimonial Order' and 'Final Matrimonial Order'. The legislation itself has not changed, so the old terms still remain current. We shall use the new terms.

Most divorces take between four and eight months from the time of filing the petition to the time when the **Final Order** is granted. The time can vary significantly depending on how quickly you and your spouse deal with the paperwork and agree the division of finances. You can get your Final Order and be free to remarry, but still not have sorted out a financial settlement. This is the course a divorce will typically take (we'll assume the petitioner is the wife):

1. The petitioner wanting the divorce will lodge her petition with the Court together with the form 'Statement for Arrangements for Children' and pay the **appropriate fee**.

2. The Court will send the respondent copies of these and a form called 'Acknowledgement of Service' and a 'Notice of Proceedings'. This is called 'serving the papers'.

3. The respondent must sign and return the Acknowledgement of Service to the Court within 7 days (or 21 days if they live outside the jurisdiction in Northern Ireland, Scotland or a Hague Convention country within Europe, or 31 days if they live in a Hague country outside Europe) indicating that he has received the petition and whether or not he intends to defend the divorce. He must also provide an address for service. This may be the first indication that his spouse has been thinking in terms of a divorce, and it may take him longer than 7 days to respond.

   - If the respondent does not respond, but she knows he has received the papers, the petitioner can apply for an order called 'deemed service' which presumes that service has taken place. She will have to fill out an **affidavit** and pay the appropriate **court fee**.

   - If she does not know he has received the papers the petitioner will need to have them served on him by a **process server** (the Respondent may end up paying for this), or by the Court bailiff (for a **fee**). The process can be hastened by the petitioner using her solicitor as process server, thus cutting the Court (and its delays) out of the equation. The process server can sign an affidavit of service as proof that the respondent has received the papers.

   - If the respondent's whereabouts are not known the petitioner will have to apply to the Court to dispense with service and swear an affidavit accordingly (with the appropriate **fee**).

4. The Acknowledgement of Service will vary according to the ground for the divorce. It is straightforward to complete; the most important questions are whether the respondent wishes to defend the divorce (see below). If the ground is adultery he will need to state whether he admits it; if he is admitting it he can also complete a Confession Statement, though it isn't necessary. Don't admit it just to get a divorce if you have *not* committed adultery. He also needs to agree the Statement of Arrangements for Children; if he doesn't agree he will need to complete his own Statement. He must sign the form and return it to the Court.

5. The Court will send a copy of the Acknowledgement to the petitioner or to her solicitor. The petitioner must then complete the 1 page Application for Directions for Trial form (**Form D84**) and an Affidavit of Evidence (Form D580G) confirming the details on the petition and Acknowledgement; it must be sworn and returned to the Court. These are the affidavit forms:

   - **D80A** – for petitions on the basis of adultery
   - **D80B** – for petitions on the basis of unreasonable behaviour
   - **D80C** – for petitions on the basis of desertion
   - **D80D** – for petitions on the basis of 2 years' separation

- **D80E** – for petitions on the basis of 5 years' separation

6. If you are the petitioner, you are advised to read the guidance leaflets associated with each affidavit. You will need to attach other relevant documents, such as a child's birth certificate as evidence of adultery.

7. A District Judge will consider the paperwork, and if it's all in order and the arrangements for the children are satisfactory he'll grant a certificate and a copy will be sent to the petitioner with a date for the Conditional Matrimonial Order (see **Rule 7.25** of the Family Procedure Rules 2010). If it is not in order the petitioner may need to amend the petition or provide further evidence, or the Court may order a **welfare report**. Otherwise the Conditional Order will be pronounced in court on this date and if all is in order and there is no dispute over costs the parties will not need to attend – it's just a rubber stamp.

8. The petitioner must then wait six weeks and a day before applying for the decree to be made final (absolute) – it isn't automatic; you must have a Final Matrimonial Order if either of you is to re-marry. The respondent may, during this period, make an application for the divorce not to be made final. At the end of this time the petitioner makes her Notice of Application for Decree Nisi to be made Absolute on **Form D36** and pays the **appropriate fee**; the Court will then pronounce Final Order within a few days, provided it is satisfied there are no applications or appeals that this should not be the case, and it will send a copy to both parties or their solicitors. If the petitioner does not make the application within four and a half months the respondent may do so, and the roles then reverse. A decree nisi has no expiry date, but if you let more than a year elapse before applying for the decree absolute you must lodge an explanation with the court stating:

   - Why you have allowed so much time to elapse;
   - Whether you have lived together in the interim; and
   - Whether any child has been born and whether or not it is being treated as a child of the family.

9. If further proceedings are necessary, because the divorce is defended or arrangements for children are not agreed, they will be conducted under **Rule 7.20** of the Family Procedure Rules 2010 which determine what steps the Court can take and how it will manage the case, calling a case management hearing if necessary, setting a timetable and making directions so that the proceedings may be concluded.

The total time the divorce takes depends largely on how quickly the parties – and their solicitors – complete the paperwork; the six week delay between conditional and final orders accounts for much of the total time, but cannot normally be avoided. In exceptional circumstances you can ask the Court to expedite the decree, for example if you are expecting a child by your new partner and wish to remarry before the birth; you must then make an application under **Part 18** of the Family Procedure Rules 2010.

Delay will be greater if the respondent decides to defend (see below), or if you insist on resolving all financial matters before the Final Order. If the delay is longer than a year you will have to write to the Court explaining why, and whether any children have been born in the interim; see **Family Procedure Rule 7.32**.

This two stage divorce process is a hangover from the 1860s when it was introduced to prevent divorce by consent which was considered a great social evil. The delay (initially 3 months and then increased to 6) enabled an officer called the Queen's Procter to investigate that the divorce was justified and that the alleged adultery really had taken place. The Queen's Proctor may still make an application to the Court that the divorce not be made absolute. One recommendation by the Family Justice Review panel was to introduce a single stage divorce procedure.

For further information obtain Leaflets **D183**, **D184**, **D185**, **D186** and **D187** from your nearest court.

2.2.7. Defending a divorce

The 'fact' for divorce used in over 70% of cases is 'unreasonable behaviour'. If you don't defend a divorce the danger is that the Court will assume any allegations used to justify the petition are true. 'Unreasonable' in this context can mean whatever the petitioner wishes it to mean; the petitioner has only to show that the marriage has broken down irretrievably. This can be potentially devastating later in the process when matters of residence and contact with children are being debated. Tacitly admitting to 'unreasonable behaviour' then can be interpreted by the Court to mean that you have been violent or abusive.

Note: that legal aid can be granted to petition, but not to defend, a divorce, and solicitors will be unwilling to represent you anyway.

Most defences are unsuccessful – the marriage is still deemed to have broken down irretrievably and the divorce will be granted – but you are still advised to defend such a petition, particularly if the 'unreasonable behaviour' it alleges is fabricated, so that you are on record as having refuted the allegations and the untruths do not become accepted as evidence; be careful not to admit facts or a sufficient number of facts which would ruin your defence and give your spouse the divorce, or damage your chances of child contact or shared residence later.

If you do not defend, which is very expensive, you should at least **cross-petition** using the fact either of adultery or of unreasonable behaviour. You are saying that the breakdown of the marriage is not your fault, but that of the petitioner. These days filing an **Answer** to the petition is usually a tactical step, for example to avoid paying costs, or to get particularly offensive allegations removed (i.e. force a revision of the petition). It is much better if you can agree who files for the divorce and which fact you will use before you start the process. It will cost less, be quicker, and avoid the escalation of animosity.

Alternatively you can agree not to defend the petition provided that the allegations will not be made or be used in children's or ancillary

matters. This strategy is unhealthily risky; how far do you trust your spouse?

There is a time limit of 21 days within which you must respond to a petition if you wish to defend it; you must file your Answer, possibly with a Cross Petition with the Court and pay the **relevant fee**. This is where being a Litigant-in-Person can disadvantage you; the other party's solicitors will use tactical tricks designed to put you out of time and thus lose you your right to defend, for example by filing correspondence deliberately late. They will also claim that your decision to defend will increase hostility – which it will, but not as a result of anything you have said. Do not fall for these tricks; get your response in on time and don't be deceived by promises of an amended petition (or whatever their strategy is). If they fail to respond in time you can use this against them when applying for costs.

Don't agree not to defend in return for an amended petition (which may or may not turn up). You have a statutory right to defend and it cannot be taken away by that sort of agreement – particularly when you have been tricked into not defending the first petition. The only reason you should not defend is if the amendments meet your objections – for example by removing all offensive allegations; but you should not agree not to defend until you have the amended petition in your hands and have read it thoroughly.

If you are refused leave to defend because you are out of time (because you have been tricked) appeal the decision. The present system necessitates the making of allegations in order to satisfy one of the five facts, and then tries hard to deny you the opportunity to refute false allegations; it is thus unjust and effectively constitutes divorce on demand.

2.2.8. Moving out

Whatever you do, ***DON'T move out!!!!*** The last thing you should do in divorce proceedings is vacate the family home. If you move out of your house and there is no Residence or Contact Order already in place,

- you will be granting your spouse *de facto* custody of your children;
- you will immediately expose yourself to petitions for child and spousal support;
- you will abandon all your joint possessions and even your personal possessions to your spouse (and you don't have to be a lawyer to know that possession is 9/10^{ths} of the law);
- you will open the way for your spouse/ex's new partner to move in to your house and become a substitute parent to your child;
- you will give your spouse leave to petition for exclusive possession of the house in perpetuity in 'the best interests of the children' thus tying up the house as an asset; and
- you will lose your only bargaining position.

If you are still living in your house and you wish to preserve a meaningful relationship with your child you must keep the house and pay off your child's other parent if you are financially able to do so. You need somewhere to live, and where better for the children than the stability of their familiar family home? It is your partner who wants to abandon the relationship, not you.

Until the divorce is finalised your spouse has 'home rights' to occupy the home, so you cannot change the locks.

The only situation in which you should consider moving out is if you own more than one property, and you'll need to surrender one anyway. Even in that situation the above objections still apply, so be very careful.

Dads: don't make the common mistake of handing over the house to Mum thinking it will sweeten her. It won't. It will mess you up financially and leave you with nowhere to have your child to stay overnight. That will mean you potentially losing contact with them. If she has initiated the divorce – which is more than 90% probable – she can make her own arrangements to find somewhere else to live.

It's common following a divorce to find the mother still living in the family home with the children while the father has been pushed out – often into a bed-sit or his car – his ex has managed to get a **Non-Molestation Order** or **Occupation Order** against him, so that he cannot enter his own home, he is still paying the mortgage, and the CSA/CMEC are taking considerable sums from him – based on a financial situation that no longer applies.

The reason such situations are familiar is that this is precisely where the mother aims to be. She has almost certainly planned this meticulously for months, with the help of her solicitor, and taken her unsuspecting husband entirely by surprise. He never even realised the marriage was shaky. It is rarer but not unknown for fathers to do this too; if you are a mother you are not necessarily safe!

If this is your situation you need to break down the situation and your problems into manageable chunks. Issues of **Non-Molestation Orders** and dealing with **false allegations** of domestic violence will be dealt with in later chapters. Separating your financial affairs as much as possible from those of your ex, for example by closing bank accounts, will be covered below. Your former partner must understand that the two of you are now divorced, and that one can no longer be financially dependent upon the other.

The argument that a mother needs a house for herself and the children is spurious; a father too has the right to a home, and needs somewhere for the children to stay when they are with him. If he hasn't got suitable accommodation, it is unlikely that a court will grant him overnight staying contact, and they certainly won't give him shared residence. It is far more important that your child continues to have two parents than that one parent continues to live in the luxury to which he or she has become accustomed.

2.3. Financial Remedy

2.3.1. Pre-nuptial agreements

Pre-nuptial agreements have not had the legal recognition in the UK which they enjoy in some other jurisdictions. Their legal standing used to be that they were not binding though they were to be taken into account. This position was transformed by the case of **Radmacher v Granatino [2009] EWCA Civ 649**. A German wife and French husband had signed a pre-nuptial agreement under German law and had then divorced in the UK. The agreement had stated that neither partner would claim maintenance from the other, but the High Court had awarded the husband funds totalling £5.6m; the wife (whose worth was in excess of £100m) appealed.

Lord Justice Thorpe allowed the appeal on the grounds that the lower court judge, Mr Justice Baron, had not given the pre-nuptial agreement sufficient weight; he said,

> *In future cases broadly in line with the present case on the facts, the judge should give due weight to the marital property regime into which the parties freely entered. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition. It is, in my judgment, a legitimate exercise of the very wide discretion that is conferred on the judges to achieve fairness between the parties to the ancillary relief proceedings.*

Thorpe explained that such agreements, made under the auspices of a single lawyer or notary, are alien to the UK system in which it is believed that a single lawyer cannot effectively represent the interests of both parties. Such agreements, therefore, must be contrary to the best interests of one party.

In the present case the wife said she had been adamant that no man should marry her for her wealth: if he was prepared to sign away his rights, then it must be love. The husband disputed this: he said his wife had told him she would be disinherited if he didn't sign. The notary who had drawn up the contract worked for the wife's family.

The Court of Appeal altered the original award so that the husband would receive the various funds allotted in his role qua father, and for the support of his children and to enable contact to take place, rather than in his role qua spouse, as had been the emphasis in the original award. This is an important distinction, based on the **paramountcy principle**, and will now apply to future cases.

A further influential finding was that, contrary to the High Court's finding, the father had known what he was walking into, had refused legal advice voluntarily, and had knowingly signed away his rights. Mr Granatino's appeal was dismissed by the Supreme Court.

The case cautions against making legally binding commitments when in a state of infatuation which you may come to regret when your ardour cools. At the very least, both parties should be legally represented; why let one lawyer have all the fun when there are two clients to be fleeced?

At a time when marriage is so uncertain and so many are failing it is unlikely that the cultural attitude towards pre-nuptial agreements will change. 'Pre-nups' are still regarded as an acceptance that the marriage will inevitably end in conflict, and couples are likely to reject them as 'unromantic' while they are still in the clutches of transitory passion. This is only likely to change if primary legislation makes them the norm – a bill may be introduced in 2012 – and yet we now live in a European country, and our judges have broad discretion to reinterpret the law.

The decision in Radmacher v Granatino will result in courts placing greater weight on pre-nuptial agreements; unwise agreements freely entered into, even without legal advice, may now become the primary source of decisions in divorce settlements.

For a court to set aside such an agreement you will need to show that circumstances have changed unexpectedly and the agreement is now unfair, or that the agreement was unfair when it was made – you didn't have legal advice or were coerced into the agreement, or maintaining the agreement will subject you or your children to hardship.

2.3.2. Maintenance

Maintenance – the money paid by a spouse for the financial support of the other – is a divisive issue in divorce settlements. If your ex has gone off with another man and moved in with him you will naturally resent having to continue paying her a tax-free income. If she's doing this in the former matrimonial home you will be even more incensed.

When making maintenance orders the Court should endeavour to end the financial dependence of one party on the other as soon as practicable.

Elsewhere in Europe ex-wives are expected to be self-sufficient and ex-husbands need only pay child support. The justification for such payments in the UK is that there are insufficient funds to enable a 'clean break' and her income is much less than yours; your decision to raise a family together has affected her ability to earn a living. There may be a time established for the payments to cease, by which time she must become self-sufficient, but if there are children the order is likely to be open-ended, and payments only cease on the wife's re-marriage, her death, or if the Court orders it.

If the new couple are living together as man and wife but have decided not to marry it is likely she doesn't wish to forgo her maintenance payments. As her ex-husband you may by now be in a new relationship yourself and in need of the money. Any attempt by you to vary the Court order is thwarted by your ex-wife. If there are children involved things can turn nasty. Is this fair?

A recent Court of Appeal decision has shifted the balance of this argument in favour of ex-husbands. This case involved a wealthy young couple with a single daughter; the judge ordered their capital to be split equally and that the husband pay maintenance to the wife of £125,000 a year. He appealed (**Grey v Grey [2009] EWCA Civ 1424**) on the grounds that his ex-wife was cohabiting with a Mr Thompson; in Court, despite ample evidence, she denied this. It was only when Mr Grey ambushed her during cross-examination with his knowledge that

she was pregnant that she admitted she was in a 'fixed, committed relationship'.

It can be difficult to establish that a couple are cohabiting, and in Grey Lord Justice Thorpe made use of the criteria used by the social services and employed in Kimber v Kimber [2001] 1 FLR 383,

a) the parties were living together in the same household;

b) the living together involved a sharing of daily tasks and duties;

c) there was stability and permanence in the relationship;

d) the financial affairs of the couple were indicative of their relationship;

e) their sexual relationship was admitted and on-going;

f) there was a close bond between the third party and the wife's child;

g) as regards the motives of the couple it was clear that the wife had denied cohabitation and acted as she had so as to continue to enjoy the payment of maintenance from her husband;

h) there was sufficient evidence that cohabitation existed in the opinion of a reasonable person with normal perceptions.

Proof of cohabitation does not automatically terminate maintenance; cohabitation is not the same as remarriage. Thorpe quoted Mr Justice Coleridge in K v K (Periodical Payment: Cohabitation) [2005] EWHC 2866; [2006] 2 FLR 468,

> *Nowadays the man on the Clapham omnibus (perhaps more likely now to be found on the crowded underground train) regards it as wholly anomalous and unfair for a cohabiting ex-wife... to continue to receive income provision from a former husband indefinitely, perhaps for the rest of her life or until she chooses to remarry. If cohabitation is to be a social norm surely financial independence from a previous partner, whether married or not must go with it?*

Reflecting on the need of the law not to 'be out of touch with generally accepted notions of fairness' Lord Justice Thorpe suggested,

> *If settled cohabitation be established then, as a matter of ordinary practice that ought to lead to no substantive maintenance order being made: or if it be a variation application the previous periodical payments order being abrogated.*
>
> *Secondly in a case where the Court has continuing concern as to the dependent's ability to be or become self-sufficient and has no obvious recourse against the cohabitant, then a nominal order should be made.*

Henceforward the courts will take it into consideration if a woman is found to be cohabiting, regardless of her new partner's contribution. The Court will exercise its discretion to determine what he *should* be

contributing according to his ability to pay (or capacity to earn) and decide whether maintenance should still be paid. Thus if an ex-wife cohabits she risks having her relationship exposed in court and the loss of her tax-free earnings.

Fathers no doubt will welcome this ruling and it may go some way to chip away at the UK's reputation as the divorce capital of the world; it will also provide an incentive for divorced women to become economically independent of their former spouses (who can be inclined to exert control by withholding payments) and allow both parties to get on with their lives.

The courts can also order the payment of maintenance for children if the liable parent is earning more than the maximum dealt with by the CSA, currently £2,000 per week. Alternatively the Court can incorporate CSA payments into a type of order known as a **Connell Order**. The Court can also include child maintenance as part of a financial order, but after a year the parties can apply to the CSA to have it varied.

2.3.3. Dividing the spoils

Legal resolution of the financial aspects of divorce used to be called Ancillary Relief; ancillary means supplementary or subordinate, and derives from the Latin for a female slave. From 6th April 2011 this is now called Financial Order Proceedings or Financial Remedy.

The basic principle on which financial matters are decided is that all assets and property are divided equally. Either party can then claim they are entitled to more than 50% either through need, or because they have made the greater contribution. If the pot is limited, however (i.e. if you are not fabulously wealthy), the Court will ensure that the mother and children are provided for and the father may end up with very little.

The **Matrimonial Causes Act 1973** enables a court to divide up and apportion property, order the sale of property, and share out pensions. A list of the factors a court should take into consideration when making its decision is provided in Section 25 of the Act. The first and most important factor is the welfare of any children under 18, this is followed by:

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the Court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the Court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit… which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The reference to earning capacity in (a) means that a court may make a financial order based on your presumed capacity to earn rather than your actual earnings, where these are lower.

The contribution made by a spouse who has remained at home to care for the children (point (f)) will be assumed to be equivalent to that of the breadwinning spouse.

Conduct (point (g)) is normally ignored by the Court, even if it has been very bad and a spouse has been consistently adulterous, or violent. These things are not considered relevant to the financial division and you won't get extra money just because you have been cuckolded.

In practice some of these factors, for example the need of the mother for a house in which to bring up her children, can override others, and lead, in this example, to a father's loss of his home. The Court may consider that a child's mother has a right to enjoy the same standard of living after divorce that she had before, regardless of the impact of such a decision on the father's standard of living, which is often considered to be immaterial.

Here are some tips to protect yourself financially and to limit conflict. You will need to do these things as soon as the divorce proceedings start.

- We repeat: close any joint bank accounts to prevent the other party withdrawing the funds or running up an overdraft. Both of these scenarios are common and will make your life even more difficult. If you can't agree to close the accounts ask the bank to freeze them, which they will do without the other party's consent.
- Make a new Will. If you die intestate all your property will default to your spouse. Unlike marriage divorce does not revoke existing Wills. You also need to appoint guardians for your child.
- Agree who is responsible for any joint debts and take steps to prevent them growing.
- Sort out any joint life insurance policies – either cash them in (hunt around for the best price) or transfer them into one name.
- If you ignore our advice and move out of the matrimonial home, transfer all bills such as council tax and utility bills to your spouse.

You won't need his or her agreement; just tell the utility company and local council you have vacated the property. Stop paying any insurance on the property.

- If your home is jointly owned you must ensure the property does not automatically pass to your spouse in the event of your death. Serve a 'notice of severance' on your spouse which will mean your share of the property will pass to your estate to be dealt with under the terms of your Will. Naturally this means that if your spouse dies first you will lose out!

- If your home is in your spouse's name only you must register your right to occupy via a 'home rights notice' with the Land Registry; she will then be unable to sell or mortgage the property without your consent. This notice will expire once the divorce is finalised.

- A useful tool if there is dispute over the allocation of individual chattels is to draw up a 'Scott Schedule' (see **Glossary**). List your assets in three columns, one for each of you and one for joint assets. Set a minimum value – say £500 – and omit personal items. Total the values, *as at the time of settlement*, not the purchase price. For high value items such as houses it is worth getting more than one valuation and then agreeing the value with your spouse. Include the value of pensions. See what you can agree on and what you can't. You each keep items you brought with you to the relationship. For other items you can draw lots, or go round your home picking an item in turn. Don't let trivial disagreements get to court.

- Make sure that any financial agreements are made into a Court Order. This ensures that the settlement is final and that neither party can make any further claims on the other. No agreement between you is enforceable unless it is made into an order.

  - **Maintenance orders** – these can be:

    - long-term, to maintain a spouse after a long marriage who cannot become financially independent;

    - short-term, to enable a spouse to become financially independent; or

    - nominal, where you pay a tiny amount per annum which can then be increased should your spouse's circumstances change – these orders are usually made where there are minor children.

  - **Property adjustment orders** – these adjust the share in property – usually a house – say from 50/50 to 60/40. The Court can also order the sale of a property, if necessary at a later date once minor children have grown up.

  - **Lump sum orders** – order the payment of a sum at once or in instalments.

  - **Pension orders** –

    - A pension sharing order transfers money from your pension fund to that of your ex; you will have to pay a fee for this.

- A pension attachment order requires you to pay part of your pension to the other party when you receive it – these are rarer.

2.3.4. Varying an order

The usual justification for varying any order is a change in the circumstances of one of the parties. If you lose your job, suffer financial hardship, etc., it may be appropriate to apply to the Court to vary the order up or down, to change the duration of the order, to discharge arrears, capitalise payments or suspend the order temporarily.

To vary a maintenance order:

- There must be a maintenance order already in place;
- The payee must not have remarried; and
- The Court must have regard to all the circumstances of the case including any changes to the factors which the Court considered when making the original order.

The Court has wide discretion to decide whether to allow a variation and its first consideration must be the welfare of any children under 18. The Court must consider the factors involved in making the original order and look at what factors have changed since making it. The Court may also consider that there should now be a clean break, perhaps through payment of a lump sum, provided this doesn't cause the recipient 'undue hardship'. Capitalisation of maintenance is enabled by Section 31(7B) of the **Matrimonial Causes Act 1973**; this is a tempting option for a woman who is proposing to remarry and would thereafter lose the right to regular payments, or whose ex is applying for a reduction or termination of maintenance. It can also be a sensible option for a man approaching retirement and will ensure no future applications from his former wife. Of course, if a man knows his ex is about to remarry he should resist a Section 31 application. An application for variation may help to achieve a clean break or there is a danger that it will rake up all the old resentments and hostilities; the case will go to Court if the parties cannot agree between themselves.

Once you make your application you will have to wait 14 weeks or so for a directions hearing. The Court will determine what further information is required and whether it needs a valuation done on your assets. It will also set out a timetable for future hearings. At the second hearing the Court will encourage the parties to settle, and if that fails the case will have to go to a final hearing, which could well be 18 months after the initial application. In the meantime the payer must continue paying maintenance as per the original order.

Applying for a variation will be chancy and costs will be high and almost disproportionately expensive compared with any variation achieved. You are advised to negotiate or settle in the cheaper Magistrates' Court before progressing to the County Court or Principal Registry

In the past maintenance orders increased over time according to the retail prices index, but this is no longer considered best practice. Recent case law indicates a tendency away from placing the onus on

the payee to argue why the maintenance period should be extended to placing it on the payer to argue why it should not. In **North v North [2007] EWCA Civ 760** the Court limited a wife's claim to increase maintenance because she had made no attempt to become financially independent through gainful employment and had frittered away her settlement on an extravagant lifestyle and unwise business ventures. She was still awarded an increase on the grounds that she was not to blame for the failure of the businesses in which she had invested.

In **Dixon v Marchant [2008] EWCA Civ 11**, [2008] 1 FLR 655 Mr Dixon applied to reduce his maintenance payments as he neared retirement; Mrs Dixon categorically denied she was cohabiting or had any intention of remarrying and the parties negotiated a lump sum payment of £125,000 under Section 31. Mrs Dixon promptly remarried and became Mrs Marchant; Mr Dixon applied for the return of his money following what he claimed was a 'Barder' event, that is, an event which happens immediately after the original settlement and would materially have affected it. The Appeal Court decided that the remarriage could not be a Barder event: the money was not returned.

The principle is named after the case Barder v Caluori [1988] AC 20 in which the mother killed herself and the two children 5 weeks after the final order for ancillary relief. The father was granted permission to appeal and Lord Brandon set out the conditions which such an application would have to satisfy:

1. New events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed.

2. The new events should have occurred within a relatively short time of the order having been made. It is extremely unlikely that it could be as much as a year, and in most cases it will be no more than a few months.

3. The application for leave to appeal out of time should be made reasonably promptly.

4. The grant of leave to appeal out of time should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order.

In Dixon v Marchant Lord Justice Wall dissented and demonstrated that the first three criteria had been met while the fourth criterion did not arise. The issue was whether the first was met: was Mrs Marchant's remarriage a Barder event? In Wall's view it plainly was. The opinion of Lords Justice Ward and Lawrence Collins was that the circumstances of the case were not sufficiently *exceptional* to fall within the Barder criteria.

In the case of **Myerson v Myerson [2009] EWCA Civ 282** it was initially agreed the wife would receive 43% of the couple's assets of £25.8 million in the form of a property and a lump sum of £9.5 million paid over 4 years. The husband's portion was in the form of shares in his company which subsequently dived in value by over 90%; the wife's portion as a percentage of the total rose to 105%. The husband applied that the decision be set aside due to a change in circumstances; the Court refused the appeal. Lord Justice Thorpe asked,

When a businessman takes a speculative position in compromising his wife's claims, why should the court subsequently relieve him of the consequences of his speculation by re-writing the bargain at his behest?

The Court accepted, however, that because the sum due the wife was to be paid in instalments, the husband could apply to have both the timing and the amount varied, following precedent set in the cases of Westbury v Sampson [2002] 1 FLR 166 and R v R (Lump sum repayments) [2004] 1 FLR 928.

2.3.5. Court procedure

If you both agree terms the settlement arrangements can be made up into a Consent Order which will take effect when you get your Final Order; you draft the order, agree it with your spouse and then send it to the Court together with a Statement of Information for a Consent Order on **Form D81** and an Application for Financial Remedies on **Form A** (since the Court cannot finalise settlement until the application is made).

Form D81 is easy to complete, simply tick the box for the order (see above) that you require. Enclose a copy for the respondent and **your payment**. If your spouse's solicitor draws up the draft you may need to get a solicitor to check it. The Court can then approve the financial arrangements which will prevent either party changing their mind later. You are strongly advised to agree on all that you can without going to court. This will be less costly, less stressful, less acrimonious and less protracted.

If you cannot agree terms things start to get expensive. One of you will still need to make an application (on Form A1 or A2) for Financial Remedies. The Court will set a timetable for the hearing, known as the First Directions Appointment (FDA), for filing and serving Form E1 or E2, and for filing and serving other documents. You will need to file with the Court and serve on the other parties:

- **Form E1** or **Form E2** (Financial Statement) – you must make a full and frank disclosure of your financial circumstances, including any properties owned and any investments; see details below.

- A Statement of the issues which are disputed – compare your Form E1/E2 with your spouse's. Only include relevant factors; now is not the time to bring up the reason the marriage failed. Include the parties' income and earning capacities, their housing needs, sale of the family home, lump sum payments, maintenance, pensions.

- A brief Chronology of the dispute, including dates of marriage and separation, date of divorce application and any orders, the parties' and children's dates of birth, purchase of property and any other key dates.

- A Questionnaire setting out further information and documents you need from your spouse, anything he or she has omitted from the Form E1/E2, and clarification of anything in the form which seems fishy. Again always keep things relevant.

- A copy of **Form G** (you'll have to get this from the Court; it doesn't seem to be available as a download), indicating simply

whether you will or will not be able to proceed with a Financial Dispute Resolution at the First Appointment.

Always read the documents you receive from your spouse very carefully, and see if there is anything that can be agreed without the intervention of the Court. This will save time, expense and conflict.

2.3.6. Form E1 or E2

Note: that the old Form E is now replaced by **Form E1** for applications in the County or High Court; applications in the Magistrates' Court are made on **Form E2**. **Form E** is only used where the marriage was dissolved overseas.

Financial disclosure must be full and frank. You cannot keep important pieces of financial information from your ex or from the Court. If you are about to receive a pay rise, are about to be made redundant, have spent all the family savings, etc., you must declare it. These forms are **affidavits**, so the same rules apply, and they must be sworn.

Before filling out **Form E1** or **Form E2** you will need to gather together all information concerning your financial situation. Corroborative copies must then be attached to the form. This information will include:

- A recent (in the last 6 months) valuation of the matrimonial home;
- Recent valuations of any other property you own;
- Your latest mortgage statement in respect of the matrimonial home and details of arrears and repayment arrangements;
- Latest mortgage statements on any other properties you own;
- Your bank, building society and National Savings statements for the last 12 months (or longer if there is likely to be a dispute);
- Technically you don't have to provide credit card statements, but you are strongly advised to produce them for the last 12 months;
- The latest statements or dividend counterfoils relating to all investments and assets, including shares, PEPs, ISAs, TESSAs, bonds, stocks, unit trusts, investment trusts, gilts and other quoted securities that you hold or have an interest in;
- Surrender valuations for any life insurance (including endowment) policies that have a surrender value;
- Details of any loan which should be treated as a joint debt;
- Accounts for the last 2 years for any business in which you have an interest;
- Documentation that is available to confirm the estimated current value of that business, such as a letter from an accountant, or a formal valuation if that has been obtained;

- A cash equivalent transfer valuation (CETV) for each pension arrangement (these can be a long time coming, but your provider must provide you with one free valuation each year);
- Your P60 for the last financial year in respect of each employment that you have;
- Your last three payslips (or more if they are not representative) in respect of each employment that you have;
- Evidence of pending redundancy, if appropriate;
- Your last form P11D, if you have one;
- If you are self-employed, a copy of your last tax assessment;
- A copy of the management accounts for the period since your last accounts if your net income from the last financial year and the estimated income for the next twelve months is significantly different.

If you do not have any of the requested documentation, letters from your accountant or evidence that the information has been requested must be provided. Failure to provide information will result in additional delay and expense, and you will have to provide the information eventually, so do it now. If you don't, because you can't be bothered, it will appear that you are trying to hide something.

The evidence a party is required to produce on Form E1/E2 cannot be used by the other party without leave of the Court. However, other evidence provided voluntarily can be used, regardless of the hearing being in chambers. Orders of the Court certainly can be used. The question of confidentiality in ancillary relief (financial remedy) was gone into by Thorpe LJ at some length in **Clibbery v Allan** [2002] 1FLR 565 CA and this should be consulted.

When you receive the copy of your spouse's Form E1/E2 you must check through it very carefully and, where you can, try to verify the information in it. It is possible that they will misrepresent their wealth and downplay their income, while at the same time over-represent their outgoings. You can get details of their financial status (assuming you were living together) by requesting a credit report on yourself from a company like **Experian** or **Equifax**. If you live with someone (or recently lived with someone) at the same address, you are deemed to be 'linked' financially.

When you apply for your file, you will also get details of your cohabitees. This will be accepted as evidence of bank accounts not declared on Form E1/E2. Of course, if your spouse knows this, he or she can get your details too. If you don't want this to happen, you write to the company and let them know your new address and ask to be 'unlinked' from the other person. The file only costs a couple of pounds and you can get it from **http://www.uk.experian.com/** or **http://www.equifax.com/**.

You may be able to prove your spouse is being dishonest by demonstrating a discrepancy between their lifestyle and their claimed income. Are there other bank accounts which are listed not on their Form E1/E2? Use the Questionnaire to help unravel these questions.

If there are discrepancies you are strongly advised to try to resolve these without going to Court, which will almost certainly cost you more than overlooking the errors is likely to do. If you have to go to Court over child contact and residence issues, quibbling over Form E1/E2 will come to seem very trivial.

2.3.7. Filling out Form E1

Form E1 is used for applications made in the County and High Court.

- At the top of the form enter the name of the Court hearing your case and the case number; give the names of the applicant and the respondent.

- Tick the appropriate box where it says 'this is the Financial Statement of the'.

1. Most of the information you must give in Section 1 is self-explanatory; if you don't know any of the dates required the Court can tell you. Do not give details of any minor ailments, only list significant disabilities. You need to give brief details of proposed educational and financial support arrangements for your child, if the CSA/CMEC have not yet decided your case you will need to chase them.

2. Work through Sections 2, 3 and 4 methodically and carefully. Beware of giving any false information. Use the advice given in the **Notes for Guidance** and read this carefully.

5. In Section 5 you must estimate all income needs for yourself and your child. You must give all your outgoings and detail if they are likely to rise. Don't leave anything out or you may end up unable to afford them.

6. If your children have any financial assets of their own, list them here.

7. Summarise the information from Parts 2, 3 and 4 here.

- When the form is complete you must swear that it is truthful and accurate before a commissioner for oaths because the form is an affidavit.

- Ensure that you attach copies – not originals – of all necessary documents, ticking the appropriate boxes as you go; then send the completed form to the Court and a copy to your spouse.

2.3.8. Filling out Form E2

Form E2 is used for applications made in the Magistrates' Court.

- At the top of the form enter the name of the Court hearing your case and the case number; give the names of the applicant and the respondent.

- Tick the appropriate box where it says 'this is the Financial Statement of the'.

1. Enter your personal details.
2. List your dependents with their dates of birth.
3. Give details of your employment.
4. Give details of bank accounts and savings.
5. State whether you live in owned or rented accommodation.
6. State your income.
7. State your outgoings.
8. List any financial payments made under a Court Order.
9. List essential outgoings.
10. List any other financial commitments.
11. If your children have any financial assets of their own, list them here.

- When the form is complete you must swear that it is truthful and accurate before a commissioner for oaths because the form is an affidavit.
- Ensure that you attach copies – not originals – of all necessary documents, ticking the appropriate boxes as you go; then send the completed form to the Court and a copy to your spouse.

2.3.9. First Directions Appointment

The First Directions Appointment (FDA) is relatively informal: no evidence is examined and the Court will not make an order. It will make directions so that at the FDR stage the dispute can be resolved.

Directions will include providing information still outstanding, such as the completed Questionnaire, valuations of property, etc. This is why it is important to get all this information together early. If the information is all available it may be possible to treat the FDA as an FDR and avoid further expense to the parties and the taxpayer.

2.3.10. Financial Dispute Resolution

If agreement cannot be reached at the FDA it will be necessary to proceed to a Financial Dispute Resolution Appointment (FDR). This is an attempt by the judge to lead the parties to agreement. The judge will provide an indication of what, in his or her view, would be the likely outcome if the case went to trial.

Each party will be invited to give their position before the judge gives his or hers. The aim is always to reach agreement, and the judge may be able to suggest a resolution which has not occurred to either party. They will be encouraged to go outside the Court to negotiate, and to come back in again to present the outcome to the judge. This process can be repeated.

The Court cannot impose an outcome on the parties at an FDR, but if they reach agreement it can be drawn up into an order. It may be necessary for the parties to draft a summary of what is agreed – a '**heads of agreement**' – which one of their lawyers can then work up into a full order for the Court to approve.

If agreement cannot be reached the dispute will have to go to trial and the judge will issue directions accordingly, including the date and time of the trial, further documents required (including position statements) and the preparation of a bundle, the calling of necessary experts, etc.

If there are complicated issues (such as substantial assets owned abroad, joint ownership of properties by third parties or trust funds) you may want to get legal representation at this stage even if you eventually decide to represent yourself.

Once the Court has made a Consent Order neither party should return to Court to make further financial claims on the other. It is therefore difficult to vary a lump sum order, but the amount ordered in a Consent Order can be varied if the circumstances change, and the income, resources and obligations of both parties will be taken into account as specified by Section 25 of the Matrimonial Causes Act 1973.[187] You should consider mediation before returning to Court.

[187] http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1973/cukpga_19730018_en_1

2.3.11. The trial

If agreement cannot be reached the case will have to go to trial. Each party will have to present evidence and be cross-examined. The Court may also hear evidence from an expert, for example regarding the value of property or assets.

The process will end with the Court making an order which can then be appealed within 14 days. The parties pay their own costs. If the order is not obeyed by the other party you will need to start action for enforcement.

2.3.12. Advice for cohabitees

There is no such concept in law as a **common law spouse**. If you are not married you do not have the same rights as married couples. You cannot claim maintenance or a share of their income or pension.

If you are renting property your partner can end the tenancy without your agreement. If you fear this may happen you need to make an application to the Court on **Form D50B** for a transfer of tenancy under Part IV of the Family Law Act 1996; once the tenancy has been surrendered it is too late.

If the home is owned it will remain with whichever party owns it; the Court cannot easily reallocate the home as it can if the parties are married. You may have a claim, but you will need specialist advice to

pursue it. It is better if you can agree to divide up any property, but if the separation is acrimonious this may not be possible.

Where there are children you may be able to make a claim for financial provision under **Schedule 1** of the Children Act 1989. This can be a lump sum or a periodical payment or a temporary transfer of property. To qualify the case must fall outside the CSA's jurisdiction, which means the liable parent must be earning at least £2,000 per week or be living abroad. The Court must consider the same factors it employs when dividing up the assets of a marriage, see **Section 2.3.3**.

If you own part of the property or think you have a claim you can make an application to the Court under the **Trusts of Land and Appointments of Trustees Act 1996** (ToLATA) for the Court to decide whether you have a claim to a share, how much that share is and whether the property should be sold. Because such an application is not a family matter, if you fail you may have to pay the other party's costs. This area of law is complex because it involves teasing out rights – beneficial interests – which have not been written down; we discuss this below.

2.3.13. The matrimonial home

Legal ownership of the house is determined by whose name is on the title deeds, but it comes without value. Owning an interest in the *value* of the house is termed *beneficial* interest or *equitable* interest. If the matrimonial home is owned jointly it is relatively easy to divide it up. If it is in the name of only one partner things become more difficult, and where there are children involved the Court can award beneficial ownership to the resident parent so that they have the right to continue living in the house. This can be until the children complete their full-time education.

This arrangement is known as a Mesher Order after the case Mesher v Mesher [1980] 1 All ER 126. A Mesher Order normally ends when the youngest child reaches 18 or leaves university, when the occupying party remarries or dies, or if the Court orders it. In the meantime the home can either be transferred to the occupying party with a charge-back to the other or be held in the joint names of the parties on trust for sale. The first option is preferred as decisions regarding the home do not need to be made by both parties, although the non-occupying party retains a share of the responsibility for maintenance and insurance of the property proportionate to his eventual share of the proceeds.

Mesher Orders are advantageous to the occupying party if they cannot afford to move elsewhere or if it is likely the non-occupying party will choose not to contribute financially in any other way. They can, however, cause more problems than they solve when the triggering event occurs, and mothers can be left worse off than if the home had been sold and the proceeds divided up at the time of the divorce. If the father has already purchased a new home when the matrimonial home is finally sold, he will have to pay capital gains tax on the sale, so it can also be in his interest to sell on divorce. Once made the order cannot be varied, which can lead to acrimony if circumstances change.

See also White v White [2001] 1 AC 596, Elliott v Elliott [2001] 1 FCR 477 CA, Dorney-Kingdom v Dorney-Kingdom [2000] 2 FLR 855 and

Clutton v Clutton [1991] 1 FLR 242 which argue in favour of Mesher orders and B v B (Mesher Order) [2003] 2 FLR 285, B v B (Financial Provision: Welfare of Child and Conduct) [2002] 1FLR 555 and Mortimer v Mortimer-Griffin [1986] 2 FLR 315 which argue against.

2.3.13.1. If ownership is shared

If the house is jointly owned the starting point for division is a 50/50 split unless there is a *trust deed* or *declaration of trust* which determines the proportion of the house each of you owns and is usually binding.

If there is no written declaration and you dispute the division the Court will decide according to principles established by Baroness Hale in Stack v Dowden [2007] UKHL 17 (paragraph 69),[188]

- any advice or discussions at the time of the transfer which cast light upon their intentions then;
- the reasons why the home was acquired in their joint names;
- the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys;
- the purpose for which the home was acquired;
- the nature of the parties' relationship;
- whether they had children for whom they both had responsibility to provide a home;
- how the purchase was financed, both initially and subsequently;
- how the parties arranged their finances, whether separately or together or a bit of both;
- how they discharged the outgoings on the property and their other household expenses;
- When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally;
- The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection.
- At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that

[188] http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070425/stack-3.htm

their beneficial interests should be different from their legal interests will be very unusual.

In other words, if you have lived together in the property for the duration of your relationship, the inference is that ownership, both legal and beneficial, is 50/50.

If, however, you are successful in convincing the Court the share of the property was to have been unequal the Court must then determine what that share should be according to how much each party put into the original purchase, who pays the mortgage, who has paid for modifications or renovations and other household expenses, and all other relevant considerations. The significant phrase from Stack v Dowden – quoted from another case, **Oxley v Hiscock [2004] EWCA Civ 546** – is 'the whole course of dealing' (paragraph 61).

But what if the parties weren't married? At the time of writing we are awaiting decision on the case of Kernott v Jones which will stand as a precedent for future cases.

In 1985 the parties purchased a property in their joint names; Ms Jones paid the deposit and Mr Kernott built an extension. They never married but produced two children before separating in 1993. Mr Kernott moved out and Ms Jones remained with the children and took on sole responsibility for the mortgage and household expenses. In 1996 Mr Kernott bought a property for himself.

In 2006 Mr Kernott wanted to realise his 50% share of the property; as a first step he severed the joint tenancy. The first instance court awarded him only 10% and the High Court (and tabloid press) agreed. He appealed and the decision was overturned by a majority of 3 to 2. The couple's agreement to continue the joint tenancy to this point was taken to 'crystallise' his 50% interest. Ms Jones appealed to the Supreme Court.

There is clear legislation to enable a court to regulate the financial affairs of married couples, but not of cohabitees. There have been calls for new legislation such as already exists in Scotland, but there is also fierce opposition to removing this distinction between marriage and cohabitation. One reason property owners don't marry, of course, is to avoid having to lose half of it at divorce; the Professional Footballers' Association advises its members not to marry for precisely this reason. The Supreme Court's task (imposed because the Legislature has shied away from the issue) is to determine whether the parties intended that the property should be held in fair shares, or whether their beneficial interests altered upon separation. The Court is also under some pressure generally to discourage litigation.

Until Kernott v Jones is settled, possibly in November 2011, it is unlikely that similar cases will be able to progress.

2.3.13.2. *If ownership is not shared*

If the property is in only one partner's name then there is no automatic entitlement and the Court must determine whether or not it was the intention at the time of purchase that the other partner should live in it. As expressed in the case of Lloyds Bank Plc. v Rosset [1990] UKHL 14,

> *The first and fundamental question which must always be resolved is whether… there has… been any agreement, arrangement or understanding… that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only… be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been.*

If the Court finds there was such an agreement the claimant has only 'to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement'. This may be done by producing a written statement or recollection of conversations. Did you, for example, refer to the house as 'our house'? The Court is invited to construct a trust arrangement – known as 'constructive trust' – to reflect the fact that both parties intended the other partner should own a share, and that he acted to his detriment in reliance. There is no need for a written agreement of deed, although it is much easier where there *is* such a document. A case can be based on recollections of discussions at the time.

If the partner made a financial contribution to the property this is known as 'resulting trust', and his share will be proportionate to the amount he contributed.

The Court will then proceed to determine what the share should be by considering the discussions held between yourself and your partner, or, where these are absent, by considering 'the whole course of dealing' between you.

2.3.13.3. If there is no agreement

If the Court finds there is no evidence for such an agreement, the claimant invites the Court to accept a 'resulting trust' on the basis of his financial contributions,

> *the Court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust… It is at least extremely doubtful whether anything less will do.*

Later case precedents have not changed this assessment.

2.3.13.4. When there are children

The fact that there are children of the marriage should not affect the division of the property; however under Schedule 1[189] of the Children Act 1989 a resident parent can apply to the Court to remain living in the property while the non-resident parent's share is put on hold until their youngest child finishes full-time education. At this point the property can be sold and both parties receive their

[189] http://www.legislation.gov.uk/ukpga/1989/41/contents#sch1

appropriate share. This provision means many fathers end up homeless, with no chance of buying another property for many years.

If you want to sell and your ex doesn't you can either remain on the mortgage and let her pay the repayments, or apply to the Court to order the sale so you can recover your share. This will cost her in legal fees, and even if she is able to get legal aid she will have to repay it from the proceeds of the sale. If she is using the same certificate for Children Act proceedings she will also have to repay that funding. Better to sort things out now than accumulate debts later.

2.3.13.5. Preventing the sale

A house cannot be sold if to do so is in contempt of a Prohibitive Steps Order. An application to vary a Prohibited Steps Order must be made within 7 days. If there is such an order in place anyone who breaches it, including the estate agents and solicitors, is in contempt.

In practice, however, jailing resident parents for contempt is not perceived to be in the best interest of the children.

You must return to the Court with an application to enforce the order and get further directions. Prepare a skeleton argument for the circuit judge together with your bundle. Write out exactly what you want and get it checked by your McKenzie Friend if you can; you may also want to get it rechecked by an independent legal source.

Your ex will then make an **Undertaking** that he or she is fully aware of the consequences of breaking the order and has been advised by their legal representatives. They thereby give an Undertaking not to complete.

Send copies of the order to the estate agents and to the solicitors, reminding them that they will be in contempt if they breach the order and that they must not exchange. Send them via a court bailiff or process server so that it is registered (you will have to **pay a fee** for this).

You will force them to halt the exchange; exchange of contracts is not completion. Completion is the part of the conveyance where the deeds are exchanged and the money is transferred between the parties. The process is very quick so you must not delay. The sale of the house will not go to completion and will simply remain in limbo.

If the sale doesn't proceed, which is likely if you take the above steps, your ex will be liable to a fine as they were not able to proceed with the contract. This will be quite punitive. That may be good if it gives them something to think about. At the same time, put in an application for residence. This will freeze their assets until the residency application is heard.

Note: that if your assets are used to provide a roof for the benefit of your child and thus your ex, you will get your capital back when your child grows up since neither your child nor your ex are allowed to receive a permanent windfall benefit.

2.4. Cases

Allen v Allen [1948] 2 AER 413 CA
Wachtel v Wachtel [1973] 1 AER 113 FD
Mesher v Mesher [1980] 1 All ER 126
Mortimer v Mortimer-Griffin [1986] 2 FLR 315
Barder v Caluori [1988] AC 20
Lloyds Bank Plc. v Rosset [1990] UKHL 14
Clutton v Clutton 1991 1 FLR 242
Dorney-Kingdom v Dorney-Kingdom [2000] 2 FLR 855
White v White [2001] 1 AC 596
Elliott v Elliott [2001] EWCA Civ 407
Kimber v Kimber [2001] 1 FLR 383
Clibbery v Allan [2002] EWCA Civ 45
B v B (Financial Provision : Welfare of Child and Conduct) [2002] 1 FLR 555
Westbury v Sampson [2002] 1 FLR 166
B v B (Mesher Order) [2003] 2 FLR 285
Oxley v Hiscock [2004] EWCA Civ 546
R v R (Lump sum repayments) [2004] 1 FLR 928
K v K (Periodical payment: Cohabitation) [2005] EWHC 2866; [2006] 2 FLR
North v North [2007] EWCA Civ 760
Stack v Dowden [2007] UKHL 17
Dixon v Marchant [2008] EWCA Civ 11, [2008] 1 FLR 655
Grey v Grey [2009] EWCA Civ 1424
Myerson v Myerson [2009] EWCA Civ 282
Radmacher v Granatino [2009] EWCA Civ 649
Kernott v Jones [2011]

CHAPTER 3: RESPONSIBILITIES

> *It is injurious to the link between the father and the child to suggest to the child that there is some reason why it is desirable that she be known by some name other than her father's name.*

Buckley J in Re T, 1963

3.1. Parental Responsibility

3.1.1. What is it?

Parental Responsibility (PR) was the most significant new concept created by the 1989 Children Act and could be conferred by a separate order. The intention of Parliament was that PR would enable schools, doctors and others to treat the 'non-resident' parent on an equal footing with the 'resident' parent (the parent with whom the children live on a day-to-day basis).

Parental Responsibility (PR) is a misnomer: it does not describe your *responsibilities* at all, but your parental *rights* – compare this, for example, with **Scottish law** which makes a clear distinction between the two.

PR is simply the 'right' to be a parent. It enables you to be treated in law as your child's parent, and gives you the authority to be involved in decisions regarding your child. PR only applies once a child has been born and does not apply while the child is *in utero*.

According to the **Children Act 1989** PR is 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child and his property'; these include:

- Providing a home for the child;
- Having contact with the child;
- Protecting and maintaining the child;
- Disciplining the child;
- Determining and providing the child's education;
- Determining the religion of the child;
- Consenting to the child's medical treatment;
- Naming the child or agreeing to the child's change of name;
- Consenting to the child's marriage (if between 16 and 18);
- Agreeing to the child's adoption;
- Vetoing the issue of the child's passport;
- Taking the child outside the jurisdiction of the UK and consenting to the child's emigration;
- Administering the child's property;
- Representing the child in legal proceedings;
- Appointing a guardian for the child;
- Burying or cremating the child's corpse;
- Allowing the child to be interviewed;
- Allowing the child to have blood taken;
- Allowing confidential information relating to the child to be disclosed.

Mr Justice Wall (as he then was) provided a useful pocket guide to parental responsibility in a footnote to his judgement on **A v A [2004] EWHC 142 (Fam).** It is really important to understand this; abuse of these principles leads to endless misery and unnecessary litigation.

1. **Decisions either parent can take independently of the other without consultation or notification:**
    - How the children are to spend their time during contact periods;
    - Personal care for the children;
    - Activities undertaken;
    - Religious and spiritual activities;
    - Continuing to take medicine prescribed by a GP.

2. **Decisions either parent can take independently but of which they must inform the other:**

   - Medical treatment in an emergency;
   - Visits to a GP and the reasons for them;
   - Booking holidays or taking the child abroad during contact time;

3. **Decisions which must only be taken following consultation:**

   - Selecting a school and applying for admissions;
   - Contact rotas during school holidays;
   - Planned medical and dental treatment;
   - Stopping medication prescribed by a GP;
   - Attendance at school functions (so the parents may avoid meeting each other wherever possible);
   - Age at which children are allowed to watch age-restricted DVDs and video games.

If you have Parental Responsibility for your child you have the same rights over that child as the other parent, even if they have residence and you do not. This is a fact of which many parents, teachers, doctors and others seem unaware, so you must assert it. In Re G (A Child) [2008] EWCA 1468 Lord Justice Ward affirmed,

> *A Residence Order gives the mother no added right over and above the father. That is the lesson that has not yet been fully learned in the 19 years that the Act has been on the statute book. The Residence Order does no more than its definition allows.*

3.1.2. Who has it?

There is no legal limit to the number of adults who can have PR for a child, despite the statutory restriction to only two parents.

The arrangements by which a parent may acquire PR are discriminatory; all mothers receive PR automatically, but fathers only have PR if they are married to the mother at the time of the child's birth, or if they later acquire it in accordance with provisions of the Act. These provisions require the mother's consent; thus unmarried fathers may not perform any role in their children's lives unless the mother wishes it. Unmarried mothers, by contrast, have the same rights as married mothers.

Another adult can acquire PR if appointed the child's guardian – usually on the death of one parent – or by having a Residence Order made in their favour. Adoptive parents also acquire PR through the Adoption Order. When a child is in care, the local authority has PR. Step-

parents do **not** acquire PR automatically, contrary to what they sometimes assume.

A father has PR:

- If he was married to the mother at the time of the birth (even if he is not on the birth certificate);
- If the child was born after 1st December 2003 and the father's name is on the birth certificate;
- If the parents both sign a Parental Responsibility Agreement and lodge it with the Court;
- If the Court makes a Residence Order in his favour;
- If the Court makes a Parental Responsibility Order in his favour.

The 1989 Act also emphasises 'the fact that a person has, or does not have, Parental Responsibility for a child shall not affect any obligation which he may have in relation to the child (such as a statutory duty to maintain the child).'

Which means in practice that while a father may lack legal PR, he will nevertheless be pursued inexorably by the Child Support Agency for maintenance. It is grossly unjust that a man should be expected to maintain a child for whom he is not legally responsible. It is alarming that anyone should try to defend this preposterous design which establishes, quite inexcusably, that family law and child support law are mutually exclusive and creates the appallingly unfair situation in which many fathers (and a few mothers) find themselves whereby they pay large sums of money to support children they can never hope to see.

Another way to think of PR is in regard to legitimacy. A child whose father does not have PR is in effect illegitimate; the Children Act re-introduces illegitimacy into law which had been removed but 2 years previously.

3.1.3. Illegitimacy

The rules on Parental Responsibility not only discriminate against unmarried fathers but also discriminate between legitimate and illegitimate children, and against the latter. Until very recently in our history it mattered greatly whether a child was legitimate or not for reasons of inheritance of property (and title) and voting rights; illegitimate children are still disadvantaged with regard to British citizenship and – more rarely – the inheritance of titles. The 18th Century position was this,[190]

> *The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for being* nullius filius,[191] *he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.*

[190] Blackstone's *Commentaries on the laws of England* 4th ed., 1770
[191] Nobody's son

It was not until the Legitimacy Act of 1926 that a bastard could be rendered legitimate by the marriage of his parents. The Act was designed to legitimate only those children whose parents were not or had not yet married, and was careful to exclude the children of adulterous relationships because of the threat otherwise of subverting the status of marriage. In 1956 the Morton report came down heavily against legitimating 'adulterine' bastards,[192]

> *The issue is fundamental but perfectly plain. If children born in adultery may subsequently acquire the status of legitimate children, an essential distinction between lawful marriages and illicit unions disappears.*

Nevertheless, in 1959 John Parker MP introduced a Private Member's Bill which subsequently became the Legitimacy Act 1959 and allowed the legitimating through marriage of such adulterine bastards. The Family Law Reform Act of 1987 finally sought to erase the label 'illegitimate' from the statute book (partly to bring English law into line with European law[193]), and no longer discriminated against a child claiming financial support from his father merely because his parents were unmarried. However, a culture had already arisen in which mothers of illegitimate children preferred to claim financial support from the State rather than have to institute proceedings and seek an order against the father. The introduction of the Child Support Act in 1991 was intended to counter this.

Until 1987 parental authority over an illegitimate child had been vested solely in the mother; removal of the concept of legitimacy would give even an 'unmeritorious' father parental authority, and this development was resisted strongly by such as the National Council for One-Parent Families. Accordingly the Law Commission – dominated by the feminist Brenda Hale – had recommended[194] that fathers of non-marital children could only acquire parental authority following judicial scrutiny. By now this would have meant fully half of fathers having to subject themselves to some sort of inquisition before being allowed any relationship with their children. Just think a moment about the people who can imagine such things.

This proposal was moderated somewhat in the 1989 Act which demanded only an agreement between the mother and father in order to confer what was by then termed 'Parental Responsibility' onto the father. The law assumes all fathers to be unmeritorious unless the mother should decide otherwise. Hale would not be disappointed – the 1989 Act effectively ensured that a father who is divorced by his wife loses his PR and can only acquire it again by jumping through the Court's hoops. A divorce still will not be approved by the Court unless it is satisfied by the proposed arrangements for care of the children – a rule which is becoming irrelevant as more separating couples were never married.

From 1st December 2003 the Adoption and Children Act 2002 introduced amendments to the 1989 Act which made it easier for an unmarried father to acquire PR through a 'Parental Responsibility Agreement' with the mother, but it still meant that, in effect, a

[192] *The Morton Report*, Paragraph 1180
[193] Specifically the European Convention on Human Rights and the European Convention on the Legal Status of Children Born out of Wedlock
[194] The Law Commission, *Illegitimacy Report*, Paragraph 4.50

father could only attain PR with the mother's consent, or, to put it more specifically, an illegitimate child could only benefit from the involvement of a father if his mother permitted it. The amendments also introduced the ability of the Court to make an order conferring PR; such orders are fairly uncommon, however: about 7,000 each year, and do not reflect the 20% of unmarried fathers who do not have PR. The uncontrolled growth of illegitimacy has inexorably resulted in many fewer fathers having PR.

In the joint cases of Sahin v Germany and Sommerfield v Germany heard in Strasbourg by the Grand Chamber of the European Court of Human Rights (ECHR) in July 2003, judgement was found against Germany on the grounds of discrimination between married and unmarried fathers. Since the introduction of the Human Rights Act 1998 (which brought the European Convention on Human Rights into UK law) to treat married and unmarried fathers differently has been contrary to the law, and the UK is thus in breach of this law.

3.1.4. Definition of parent

A child may only have two legal parents – although this is contradicted, for example, by Re G (Children) [2006] UKHL 43 in which the child seems to have three mothers.

Under legislation introduced in April 2009 the legal mother continues to be the woman who carried the child, regardless of how the embryo came to be in her womb, and regardless of genetics. She ceases to be the mother if an Adoption Order or Parental Order is made.

If a female partner, whether joined by a civil partnership or not, is considered to be the child's other parent, no man can also be considered the child's parent, even if biologically he is the father. Such a man would therefore not have the automatic right to apply for a Contact Order and would need the leave of the Court. Such a child would legally be fatherless, which contradicts the view confirmed by the courts that he has the right to know his biological identity; see Mikulic v Croatia [2002] 1 FCR 720 and **R (Rose and another) v Secretary of State for Health and another [2002] EWHC 1593**; [2002] 3 FCR 731.

There are anomalies in this brave new world: where two gay men care for a child they are to be regarded as the 'parents' but not as the 'fathers'. Consider a situation such as surrogacy in which a child can have a biological mother (who provides the egg), a mother who carries and gives birth to the child, and an adoptive mother. Consider, also, a case in which a wife leads her husband to believe that he is the biological father of her boyfriend's child, and where she then divorces her husband and marries a third man. All three men will have a relationship with the child, and may have a legitimate claim to contact, but cannot be regarded as 'parents' since a child can only have two. The legal definition of a parent establishes at once a further discrimination under the law between the sexes; legal motherhood is based on whether the woman in question carried the child, regardless of genetics. Legal fatherhood, on the other hand, is based on genetics. A man will also be presumed to be the father if:

- He was married to the mother at the time of birth (if he was unmarried at the time of conception the rule still applies) – this

rule is known as *pater est quem nuptiae demonstrant* or *pater est* for short;

- His name is on the birth certificate;
- He has a Parental Responsibility Order by consent (the CSA/CMEC will accept this though the courts may not); or
- There are other corroborative factors – e.g. he slept with the mother on the night of conception.

Legal changes introduced under the Human Fertilisation and Embryology Act 2008 will complicate matters further by establishing a third category of legal parent who is neither the father nor the mother of the child, but the 'other parent'; similarly, someone who is either the father or the mother may not necessarily be the legal parent. These changes will affect adoption as well.

3.1.5. The 'other parent'

The notion of fatherhood has become fragmented,[195] and commonly must be shared between two or more men: the genetic father, the mother's husband, mother's ex-husband, mother's boyfriend, etc. This is particularly so in cases of Assisted Reproductive Technology or ART. The new legislation effectively eradicates the concept of fatherhood and introduces the term 'other parent' who can be either male or female.

- If the mother is married at the time of impregnation her husband is regarded as the child's father regardless of whether or not the sperm is his. If the sperm is *not* his and he did *not* give his consent to impregnation, he is *not* to be regarded as the father.
- If the mother is not married and there is no other adult regarded as the 'other parent' *and* the impregnation was carried out by a licensed provider *and* the 'agreed fatherhood conditions' were satisfied, that man is regarded as the father.

  The agreed fatherhood conditions are:

  - that the man has given his consent to be regarded as the father under licensed impregnation;
  - the mother has given her consent that the man be so regarded;
  - neither has withdrawn their consent;
  - the mother has not given her consent that another adult be regarded as the parent of the child; and
  - the mother and father are not in a prohibited relationship to each other.
- A sperm donor is not regarded as the father of a child if he donates through a licensed provider. If he donates on a do-it-yourself basis he *will* be regarded as the father; see Re M (Sperm

[195] See inter alia *Fragmenting Fatherhood* by Richard Collier and Sally Sheldon, 2008

Donor: Father) [2003] Fam Law 94. If the man dies after donation he is not regarded as the father.

- If the mother is in a civil partnership with another woman at the time of impregnation, the other woman is regarded as the 'other parent', she has Parental Responsibility and the child is legitimate. If the other woman did not give her consent to impregnation she is not to be regarded as the other parent.

- If the mother was not in a civil partnership with another woman and no other adult is regarded under the above rules as the other parent of the child, but the mother is in an informal relationship with another woman and impregnation is carried out by a licensed provider then the other woman is to be regarded as the other parent. If the two women are joined in a civil partnership before the birth of the child, the child is legitimate.

3.1.6. PR agreements

If the child's birth has already been registered a father can complete an official Parental Responsibility Agreement which the mother must sign. The application is made on **Form C(PRA1)** which must be taken to the Court and signed before a court officer and then sent to the Principal Registry of the Family Division which will rubber-stamp it.

Perversely it is much easier for a step-father to acquire PR for a child than for a biological father to do so. Under the Adoption and Children Act 2002, which came into force on 30th December 2005, married step-parents or gay and lesbian step-parents who have entered into a civil partnership are also able to make a Parental Responsibility Agreement. Shamefully this right does not extend to a father who is the victim of **paternity fraud**. What this new rule means is that his ex can effectively nominate her new partner for PR. They must be married or, if the ex's new partner is of the same sex, there must be a registered civil partnership; an unmarried partner cannot become a step-parent.

The application for a Step Parental Responsibility Agreement is made on **Form C(PRA2)**. The agreement can only be overturned by a Court Order. If the father has PR his ex will need his consent and signature on the form, though his objection can be overruled if she applies for a Parental Responsibility Order from the Court. If the father doesn't have PR his consent is not required and he can't object, so if you are a father and you don't yet have PR **you are strongly advised to apply for it now!**

In Re X (Parental Responsibility Agreement: Children in Care) [2000] 1 FLR 517 a local authority tried to prevent a mother exercising her PR by signing an Agreement giving the father PR; the Court ruled the LA could not so prevent the mother, nor could it prevent a marriage which would automatically grant PR.

3.1.7. PR orders

If the mother does not agree to your having PR you will have to apply to the Court under Section 4 of the Children Act 1989 for a Parental Responsibility Order (PRO) and argue why you feel your child will be disadvantaged by not having two parents with PR. Emphasise to the

Court the benefits to the child, and your willingness to exercise your responsibilities. You apply on **Form C1** or **Form C2** and have to pay the **appropriate fee**.

Most applications are granted, even to fathers who will then be denied unsupervised contact; it must be emphasised that PR gives you access to the courts and further Section 8 orders, but it is no guarantee that your rights will be respected.

The awarding of a PRO must be in the child's best interests, but the Act does not define the criteria a father must meet; the criteria used by the courts were established by Balcombe LJ in Re H (Minors) (Local Authority: Parental Rights) [1991] Fam 151 CA and so are known as the Re H criteria:

1. the degree of commitment which the father has shown towards the child;

2. the degree of attachment which exists between the father and the child;

3. the father's reasons for applying for the order (this criterion allows the Court to screen for improper reasons).

In 1994 Lord Justice Balcombe had said,[196]

> *The purpose of a Parental Responsibility order is to give the unmarried father a 'locus standi' in the child's life by conferring on him the rights which would have been automatically his by right had he been married to the mother at the time of the child's birth. The making of such an order would enable the father to contribute to the promotion of his daughter's welfare and to play the natural part of her father in her future, although it did not give the father any rights of either residence or contact; and in the present case, the child remained in the care of the local authority, with contact being at its discretion.*

Re H (Parental Responsibility) [1998] 1 FLR 855 established that these criteria represented a starting point and were not an exhaustive list; the child's welfare remained paramount. For example, in Re M (Handicapped Child: Parental Responsibility) [2001] 2 FLR 342 a father who met the criteria was nevertheless denied PR because it would have put stress on the mother and interfered with her ability to care for the child.

The Court will consider such questions as: were you at the birth; do you continue contact; are you involved in your child's education and development (not always easy – see the **section on schools**); do you contribute financially? Note that Re H shows attachment to be a two-way process.

If it is likely that the mother will oppose your application for PR, use this argument from Lord Justice Wall in Re S (Parental Responsibility) [1995] 2 FLR 648,

> *I have heard up and down the land, psychiatrists tell me how important it is that children grow up with a good self-esteem*

[196] Re G (A Minor) (Parental Responsibility Order) [1994] 1 FLR 504

and how much they need to have a favourable positive image of the absent parent. It seems to me important, therefore, wherever possible, to ensure that the law confers upon a committed father that stamp of approval, lest the child grow up with some belief that he is in some way disqualified from fulfilling his role and that the reason for the disqualification is something inherent which will be inherited by the child, making her struggle to find her own identity all the more fraught.

3.1.8. Filling out Form C1

- Enter the name of the Court and your child(ren)'s full name(s).

1. Enter your name and details and relationship to the child. If you have no solicitor state this.
2. Give the child's details and what order you are applying for – Form C1 can also be used for orders relating to appointment of guardians (see **Section 11.1.2**).
3. Enter details of other relevant proceedings as specified in the question. Don't forget to attach copies of orders.
4. Give details as requested of the respondent; this will normally be the mother.
5. Usually you can leave this blank, unless another party is routinely caring for the child.
6. Answer the questions on the form about the care of the child.
7. If you answer 'Yes' here you must also fill out **Form C1A**.
8. Answer the questions about the Social Services.
9. Answer the questions about the child's education and health.
10. Answer the questions about the child's parents.
11. Answer the questions about any other children.
12. Answer the questions about any other adults.
13. Give very briefly your reasons for the application and what order you want. Your **Position Statement** will contain the details. It is enough to say, 'My ex is preventing me seeing my child and I am applying for a Shared Residence Order'.
14. Answer the questions about any special needs you may have.
15. Answer the questions about **Parenting Plans**.

- Sign and date the form.

3.1.9. Shared residence orders

If you are the child's father you do not need to have Parental Responsibility to apply for a Residence Order. When the Court makes the order it must also make an order for PR.

If you are not the child's biological father you cannot apply for a Parental Responsibility Order (PRO), but you can apply for a **Shared Residence Order** which will then automatically confer PR for the duration of the order. The order can also contain a clause stating that PR has been conferred, to make the point absolutely clear.

Step-fathers and step-mothers can also acquire PR for their partner's children by applying to the Court for a Residence Order.

If the Court makes the order it will say that the children should live with the named person – either permanently, or for the particular period contained in the order. If arrangements for step-children after a separation cannot be agreed, the Court's permission will be required before making an application for a Residence or Contact Order.

3.1.10. When PR ends

Parental Responsibility expires when the child reaches an age at which he is able to make the decisions previously covered by PR. At the age of 16 a child can leave school, marry with parental consent, change his name, consent to sexual intercourse, consent to medical treatment, or ride a motorcycle. At the age of 18 he becomes a fully-fledged adult able to make his own decisions on all aspects of his life.

3.1.11. Delegating PR

Under Section 2(9) of the Children Act you can delegate PR to someone acting on your behalf, thus if you have a Contact Order specifying who collects your child, or prohibiting collection by someone else, collection can be delegated by you.

> *A person who has Parental Responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.*

Sometimes a court can overrule a parent's PR, where the parent is making a decision deemed by the Court not to be in the child's best interests, for example where a parent is withholding medical treatment.

3.1.12. Surrendering PR

A court can take PR away from you by means of a Declaration of Non-Parentage under section 55A of the Family Law Act 1986. Section 55A(1) of this Act also provides for an alleged parent to apply to the Magistrates' Court or preferably to the County Court or High Court for a declaration (of Parentage or Non-Parentage) as to whether or not they are a parent of a child.

Subject to the following provisions of this section [which concern domicile, etc.], *any person may apply to the High Court, a county court or a magistrates' court for a declaration as to whether or not a person named in the application is or was the parent of another person so named.*

Procedure is provided by the Family Proceedings Courts (Family Law Act 1986) Rules 2001.[197]

There is no downloadable form for this application and you will need to obtain Form FL423 directly from a court. You then fill it in between a series of bullet points. You must also complete and swear an affidavit. The completed application must be given to a circuit judge or higher for approval.

This is an irrevocable step, and not one to be taken lightly.

Fathers: if during a contact dispute a DNA test proves you are not the biological father you will lose PR. You cannot apply for a Parental Responsibility Order, and if the mother is trying to marginalise you your only option is a Shared Residence Order which will automatically confer PR; there has been some recent success in this area, see **Section 1.3.5**. You can still be awarded a Contact Order, but you will not have PR for the child. This arrangement is not made clear in the Children Act, but it derives from the legal definition of fatherhood, which relies initially on genetic paternity (see above).

[197] http://www.legislation.gov.uk/uksi/2001/778/schedule/made

3.1.13. Paternity fraud

Paternity fraud occurs when a mother fraudulently names a particular man as the father of her child despite knowing that biologically he is not.

Paternity fraud can occur in two contexts. When it happens within marriage the motive is often to hide adultery and to hold the marriage together. The husband will bring the child up as his own, providing a home for the mother and paying for the upkeep of her child, until such time as she wishes to change partners. At that point the man, and more damagingly, the child, will discover that they have been hoodwinked. If the mother is determined, the relationship established between father and child will end, and the father will lose PR, though not, at least in theory, the right to make a Section 8 application.

The second context is that of child support, where a mother will identify a man as the father in order fraudulently to collect maintenance from him. Sometimes celebrities are named; in some cases the alleged children are even fictitious.

The fraud can be proved by means of a **DNA test**, but it is not considered a crime, and there will be no consequence to the mother. Giving fraudulent information to the CSA *is* a crime, but no mother has been prosecuted as a result.

3.1.14. Seeking compensation

Some men falsely identified as the father seek compensation from the mother, both for the costs incurred bringing up the child and for the emotional trauma caused. The legal route is to seek damages under the tort of 'deceit'. Tort law involves seeking remedies for civil wrongs incurred under obligations not covered by a contract. In the tort of deceit the claimant must prove on the balance of probability that the intention was fraudulent (Deek v Peek [1889]). He must demonstrate,

- That the defendant made a representation (i.e. that a particular man was the father of a particular child);
- That the defendant intended the claimant to act on that representation in such a way that damage resulted (i.e. the claimant paid for the child's upkeep, child support or school fees, or that a bond was established between father and child);
- That the claimant acted on the falsehood and relied on it, and would have acted differently had the falsehood not been made;
- That the claimant has suffered loss as a result of the falsehood.

Financial loss is easy to quantify, while putting a financial value (the Court's only recourse) on emotional distress is down to the judge's discretion.

In P v B (Paternity: Damages for Deceit) [2001] 1 FLR 1041 judge Stanley Burnton ruled that a man was legally entitled to recover damages of £90,000 from the mother of a child both for pecuniary loss and for the 'indignity, mental suffering/distress, humiliation' caused by the false allegation of paternity.

In A v B (Damages: Paternity) [2007] 2 FLR 1051 a stockbroker claimed £100,000 for emotional hurt, and for the cost of bringing up a child and paying school fees. Judge Sir John Blofeld awarded him £22,400 in damages for the emotional distress (a strangely specific sum for the unquantifiable), but would not order compensation for the costs of raising the child; Blofeld said 'Mr A fell in love with his son as he believed. He loved him, he wanted him, he treasured him.'[198]

In the same year, in a widely reported and discussed case, Mark Webb sought compensation from his wife and her lover after a DNA test revealed he was not the biological father of his 17-year-old daughter. The case was dismissed by the Bournemouth Family Court. Mr Webb appealed, but unsuccessfully. Lord Justice Thorpe admitted the case raised 'interesting socio-legal arguments', but believed it would 'visit upon the litigants huge burdens, both financial and emotional, which are disproportionate to any prospects of success… This whole case can be categorised as a misfortune to all those engaged in it. I would not wish to be the one to extend their misfortunes further.'[199] In the Family Court there is no distinction

[198] http://www.guardian.co.uk/uk/2007/apr/04/law.world
[199] Martin Beckford, *Husband in court bid to claim damages from ex-wife and her lover 'for raising their child'*, Daily Telegraph, 22 January 2009, http://www.telegraph.co.uk/news/uknews/4306288/Husband-in-court-bid-to-claim-damages-from-ex-wife-and-her-lover-for-raising-their-child.html

between perpetrator and victim, and both are equally the objects of mere 'misfortune'.

In August 2009, a millionaire issued a writ against his ex-wife for conspiring with her lover to deceive him over a 14-year period. Without his knowledge the mother arranged to have the children DNA tested, and it emerged that his two youngest children, aged 16 and 13, had been fathered by the lover. He claimed over £300,000 to compensate for the cost of raising the children and for deceit.[200]

3.1.15. Discussion

Some argue that the issue of paternity fraud is a mere sideshow compared with the carnival of father exclusion and the assault on the family. This perspective is mistaken: how the law responds to paternity fraud goes right to the heart of how society values fatherhood. Legislators can either revise legislation to take the new certainties provided by DNA testing into account, or bury their heads in the sand and pretend this influential technological revolution has not happened.

In some jurisdictions for example, as is the case in California, men are denied the right to challenge a mother's claim of paternity, yet will still be held responsible – i.e. liable for child support – for a child to whom they are not biologically related.

As the law stands in the UK[201] the consent of only one adult with PR is required to take a DNA sample from a child, and you are able to perform a do-it-yourself DNA test with a cheap kit available for as little as £90 (note that although some kits, such as those sold by Boots, are advertised for only £30 this price does not include laboratory fees). The British Medical Association (BMA) advises that 'motherless testing' (in which only the putative father and the child are tested) should only take place where the mother agrees to it,[202] and that such testing must be demonstrated to be in the best interests of the child; in practice this requires a Court Order to establish. They add, without evidence or explanation,

> *The BMA believes that* [motherless testing] *could be very harmful to the child, as well as to the family unit as a whole, and would prefer to see a situation in which the consent of the mother and putative father (and the child if sufficiently mature) is required for paternity testing.*

Motherless testing is presumed to infringe the rights of the mother, but no 'right' is involved, except perhaps the right of a mother to commit adultery undetected.

The industry code of practice[203] – which only applies to the UK – is that motherless tests should nevertheless not be undertaken without

[200] Frances Gibb, *Tycoon sues his ex-wife after discovering children were not his*, The Times, 27 August 2009, http://business.timesonline.co.uk/tol/business/law/article6811203.ece

[201] The Human Tissue Act 2004, http://www.opsi.gov.uk/acts/acts2004/ukpga_20040030_en_1

[202] *Paternity testing: guidelines for health professionals*, BMA, October 2007, http://www.bma.org.uk/images/Paternitytesting2007_tcm41-147033.pdf

[203] *Code of practice and guidance on genetic paternity testing services*, Department of Health, 23 March 2001,

the mother's consent, unless the putative father has 'care and control' (by which they presumably mean PR), which should be confirmed by a solicitor. This guidance has no legal basis, and a solicitor's letter is legally worthless: he will simply write whatever he is paid to.

The Labour Government proposed to outlaw motherless paternity tests by making it a criminal offence to take DNA material from a child without the consent of *all* those with Parental Responsibility, though that would certainly have discriminated against fathers. Some jurisdictions, such as Germany, already prohibit motherless testing. Unsurprisingly, testing companies report that motherless tests are the most popular they provide.

The presumption of the UK courts that it is generally in the child's best interests to have the truth determined is not compatible with the failure of the courts to consider the consequences of a negative result, or with the failure of the law to provide the courts with guidance on this issue. There are no specific provisions for mistaken paternity or for paternity fraud in the Children Act, and the definition of a father based on the *pater est* rule **changes** after a negative DNA test, leading to the loss of Parental Responsibility.

Mothers generally know (with few exceptions) if a child is genetically theirs; fathers do not, and in the interests of equality have the right to find out in situations where there is a degree of doubt. A paternity test gives a man information – without the mother's knowledge – which the mother has previously held without the man's knowledge: it evens things up. A brief search of the internet will show that large numbers of companies are offering DNA testing services, indicating the growing demand for these tests from fathers. The opposition to paternity testing is further evidence of the scale of the problem. To ban these tests would be counter-productive and force fathers to seek them from foreign agencies not subject to UK legislation. The issue is really about knowledge: who has the right to that knowledge, and who has the right to control that knowledge. Knowledge, obviously, is power.

There are several arguments behind the desire to prevent testing. The first is to ensure that someone – the nearest man with a wallet – continues to pay child support for the child. This is the consequence of society's reduction of fatherhood to a financial exchange, and is indefensible: no one should have to pay to raise someone else's child. Fathers who use paternity testing to challenge child support claims are not, as some protest, evading their responsibilities: they never had responsibilities towards these children in the first place.

Some believe that the revelation of a child's true paternity should only be made in the context of a court so that they can ensure the parties have access to appropriate counselling and support. This is a misapprehension: the courts are concerned only with the legal dimension of a case, they have no interest in the emotional impact of revelations about paternity or any of the other traumatic consequence of family justice.

The final motive is the belief that the exposure of paternity fraud – especially after several years – is hugely damaging to the child and to the father. This argument is also flawed: it is not the knowledge afforded by the test which is damaging, but the adultery it exposes.

http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4078296.pdf

The test doesn't alter the reality, it merely widens the availability of the knowledge; suppressing the knowledge attempts to hide the consequences of infidelity. Typically the man is already aware of the infidelity; the purpose of the test is rather to determine which of the men the mother has been sleeping with is the father. The better way to limit the fallout from what is quaintly called 'surprising paternity' is to establish the truth as early as possible, before the relationship between father and child is established. This would also give the biological father a greater chance to become involved. The better way to protect against unregulated cowboy DNA testing is to make official testing freely and easily available.

The scale of 'surprising paternity' is not insignificant. Testing agencies report that where paternity is tested – and therefore already in doubt – between 14%[204] and 30% prove negative; amongst the general population the figure is usually put at around 10% for the first child, and as high as 25% for the fourth child.[205]

If a man really is the genetic father, confirmation of that will set his mind at rest, strengthen the marriage and remind him of his financial responsibilities should the marriage fail. The mother does not need to know about the father's baseless suspicions. Six out of seven tests confirm paternity, and are therefore alternatively referred to as 'peace of mind' tests.

If he is not the father then the marriage has already failed: his wife has committed adultery and a child has been born; she has lied to her husband, to her child, and probably to everyone else, possibly for years. The DNA test is not the problem and will not make matters any worse. If the mother has not confessed her adultery she also will not act in the child's best interests by giving her consent to a test which will lose her the security of the marriage and the right to claim child support. It is important in that circumstance that the father be able to arrange a test without her consent.

The DNA genie is out of the bottle and will not be returned; the law *must* keep pace with the technology. Governments need to grapple with this issue, rather than dismiss it on the grounds that fathers are unimportant anyway. Censoring the truth is no answer.

Fathers who sue for compensation or damages are often condemned by the feminist press for suing their children's mothers as if doing so meant they were rejecting their children. This is not the case, a fraud has been committed, often for the purpose of financial gain, and there is no reason why a man should simply roll over and accept it.

Paternity fraud is a disgusting crime, and should be punished accordingly. For many men this will be their only chance at fatherhood. By the time the fraud is discovered it may be too late for them to have another family, and yet the consequence of finding out may be the breakdown of the family, the exclusion of the father and a lonely future.

Pressure needs to be placed on the courts to deal with such cases appropriately, for example by according defrauded fathers the same rights as genetic fathers (such as they are), and to balance the right to know the truth against the likely devastation caused the child. One US family policy think-tank concluded that once a child has passed the

[204] Quoted by spokesman for Cellmark, Sunday Times, 23 January 2000
[205] Quoted by Max Planck Institute in Munich, Germany, The REPORT Newsmagazine 24 April 2000

age of two, the harm caused by the loss of a father outweighs other considerations.

It would be appropriate to set a maximum age (of one or two years) after which a negative DNA test does not remove a father's Parental Responsibility, and a father's right to make applications for contact and residence is not affected. Up to that age it would be permissible for either parent to challenge paternity. Some campaigners, such as *Fathers for Life*, have even called for mandatory DNA testing of children at birth; it's a sensible proposition. It is appalling that children are often losing loved and loving fathers because of a deception perpetrated years before.

A message must also go out to mothers that fathers are not interchangeable, to be swapped around on a whim. In Vermont they are considering making paternity fraud punishable by two years in jail.

3.2. Exercising Parental Responsibility

3.2.1. The right to be a parent

The Family Courts seem to take a father's right to be a parent to his child very lightly. You should note that as the Family Courts interpret it your right under Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 to 'family life' is only engaged where your 'family life' is already established.

In Re G (A Child) (Adoption; Disclosure) [2001] 1 FLR 646 the Court concluded that a putative father had no right to be informed of the birth of his child. The parents had never cohabited and their relationship had never constituted a 'family'. In the case which formed part of the same hearing, Re H, however, the parents had lived together for several years and there was an elder child, the father was therefore entitled to respect for his 'family life'.

In the case of Re J [2003] EWHC 199 (Fam), a young mother sought to have her baby adopted. Whilst the mother identified the father to social services she refused permission for him to be approached. Social services took the view that the father should be consulted prior to adoption proceedings and sought the Court's permission to breach their duty of confidentiality to the mother. The Court took the view that the father's consent could be dispensed with, on the basis that the man, who had not been aware that he was a father, had not hitherto played a parenting role in the baby's life and should, therefore, be precluded from so doing in the future.

In 2007 a local authority took a mother to Court who wanted to keep the birth of a child (Baby E) secret from the child's father; although the mother wanted to release the child for adoption, the LA believed that her family and the father should be given the opportunity to bring up the child.[206]

The County Court agreed, and the mother went to appeal. In **Re C (A Child) and XYZ County Council and E.C. [2007] EWCA Civ 1206** Lady Justice Arden, and Lords Justice Thorpe and Lawrence Collins

[206] Owen Bowcott, *Mother's court fight to keep baby secret from father*, the Guardian, 08 November 2007, http://www.guardian.co.uk/uk_news/story/0,,2206996,00.html

ruled that the father could neither be identified nor informed, and that the child could not be introduced to her grandparents.

In **M v F and Others [2011] EWCA Civ 273**, 1 FCR 533 the Court of Appeal upheld the High Court decision of Nicholas Mostyn to refuse the application of a mother who wanted to place a child for adoption and keep its existence a secret from the father. The local authority believed the father should be informed. The critical factor was that the parents already had children and thus the father's Article 8 rights were engaged because a full family life already existed. His Article 6 rights were also engaged as he had the right to be involved in any legal process which would have taken the child out of the family and to challenge that.

A court will only allow such an application in 'exceptional circumstances.' The courts interpret this to mean in circumstances in which no family life has been established, but we believe that principle denies the child any opportunity for family life to become established. This contradicts the principle – under Section 1 of the Children Act – that it is the child's *welfare* which should be paramount and the Section 23 directive that where possible a child should be placed with his family. Fathers who, in the words of Lady Justice Arden, have 'no right to be violated' will nevertheless feel that their rights have been violated. In the Family Courts a mother and a child is a family; a father and a child is not.

3.2.2. Finding a missing child

If you don't know where your child has been taken you can apply under Section 33 of the **Family Law Act 1986** for disclosure of the child's whereabouts. The application is made on **Form C4**. You must be clear – question 3 – who you want the order made against; it may be a relative who has helped the removal, it could be the DWP or Revenue who are paying out benefits, or it could be the local authority which is providing schooling.

You can also make an application on **Form C3** for the child's recovery. Recovery may only be ordered only where a Section 8 order (or equivalent order made in Scotland or Northern Ireland) has been breached and where a child has been snatched from a primary carer; it may result in a police officer taking your child by force.

If you do not know where your child is and the courts are unable to assist there are a number of organisations which can help you. Your first option should be the Salvation Army who have a dedicated unit, The Salvation Army Family Tracing Service, 101 Newington Causeway, London SE1 6BN – they report an 85% success rate.
Tel: 0845 634 4747 or email: familytracing@salvationarmy.org.uk,
Website: **www.salvationarmy.org.uk/familytracing**

You can also try:

Reunite, P O box 7124, Leicester LE1 7XX Advice Line: 0116 2556 34
Tel: 0116 2555 345 or email: reunite@dircon.co.uk,
Website: **www.reunite.org**

National Missing People Helpline (formerly Missing Persons), Freephone helpline: 0500 700 700, Helpline from outside the UK: +44 (0)20 8392 4545, Message Home helpline: 0800 700 740. Website: **www.missingpeople.org**

Look4Them.org.uk: **www.look4them.org.uk**

Missing You: **www.missing-you.net**

You should also read Chapter 14 on Relocation.

3.2.3. Doctors

If you are a separated parent you must take an active interest in your children's health – do not leave it all to the other parent. Are all their inoculations up-to-date? Do they have any recurrent illnesses which may be cause for concern? Are they taking any prescribed drugs, and if so do you know why? Have you met with their GP to discuss their health? You may need to take proof of identity and their birth certificates with you. All of this involvement can later be used in Court as evidence that you are a fully committed parent, and not just a bystander.

If your child receives any medical treatment while in your care, you are obliged to consult with the other parent. If the treatment is an emergency, you don't have to consult, but you must still tell the other parent afterwards.

Although divorce doesn't affect the status of your PR, you will find that schools and doctors will often act as if divorced, non-resident fathers do not have PR. The British Medical Association (BMA) gives this advice to its members,[207]

> *Anyone with Parental Responsibility has a statutory right to apply for access to their child's health records. If the child is capable of giving consent, access may only be given with his or her consent. It may be necessary to discuss parental access alone with children if there is a suspicion that they are under pressure to agree. (For example, the young person may not wish a parent to know about a request for contraceptive advice.) If a child lacks the competence to understand the nature of an application but access would be in his or her best interests, it should be granted. Parental access must not be given where it conflicts with a child's best interests and any information that a child revealed in the expectation that it would not be disclosed should not be released unless it is in the child's best interests to do so. Where parents are separated and one of them applies for access to the medical record, doctors are under no obligation to inform the other parent, although they may consider doing so if they believe it to be in the child's best interests.*

Where there is a dispute the Court must decide where the child's best interests lie and not the health authority or the doctor. Note that the BMA doesn't give guidance on what surname to use for a child

[207] http://www.bma.org.uk/ap.nsf/content/parental

where it is in dispute. The law still applies, however, that the consent of all those with Parental Responsibility is required.

In practice it may be necessary for a solicitor to write to the doctor confirming you have PR, and you may find that any records sent are incomplete, or have sections blanked out. All records belong to the local NHS trust. The NHS have an excellent customer service unit and provide leaflets at all major hospitals on how to complain. You can download the leaflet from the Department of Health website.

You are advised to take the softly, softly approach. You may need the doctor as an ally later and it isn't a good idea to alienate him unless you are forced to. Save the iron fist approach until there is no alternative. This is the sort of letter you could write initially,

> *I have some grave concerns regarding the health of my daughter/son (give names).*
>
> *I do not feel that I can discuss these over the phone or by letter and would therefore wish to talk directly to his/her doctor about them.*
>
> *I understand the doctor is in an awkward situation and I am aware he may feel that he is being asked to take sides.*
>
> *This is not the impression I wish to give; I am only enquiring as a concerned parent. I would request that in the first instance I make an appointment with the doctor to discuss my child's health.*

Access to medical records is governed by Section 7 of the Data Protection Act 1998 which you should consult. It may be that a complaint to the Information Commissioner would be effective but ultimately you may have to enforce your rights in the courts. Another possibility would be to proceed against the other parent on a Specific Issue application under the Children Act 1989, and then subpoena the doctor to produce the medical records.

It is common for a dispute to arise over medical treatment such as vaccination. If one parent objects the treatment will not go ahead until the Court has ruled otherwise. To prevent treatment you need to apply for a **Prohibited Steps Order**; if you want treatment the other parent opposes apply for a **Specific Issues Order**. The Court will rule according to the child's welfare, so you would need to provide an expert witness to put your case.

3.2.4. Schools

If the other parent has PR you cannot take unilateral decisions about your child's education; you must consult. If you can't agree the Court will have to impose a decision.

It is essential for both parents to be involved in their child's education. This is more difficult if you only have weekend and holiday contact, and is why midweek contact is so important, enabling you to help with your child's homework, visit and see the school, and meet teachers and friends. If you do not know which school your child attends but know the general area, you can write to the local education authority and request this information. State your name,

the child's name and your relationship. Ask for the address of the school and name of the head teacher, so that you can write to them and ensure your continuing involvement in your child's education and development. State that you are making the request under the **Education (Pupil Information) (England) Regulations 2005** or **Section 7** of the Data Protection Act 1998. Note that not all schools (e.g. academies) are subject to the 2005 Regulations, so check the small print.

Schools are required by the Department for Education to treat both parents equally, and not to discriminate against non-resident parents, but in practice they often ignore this guidance. This is a summary of the advice given; note that it is only sent to head teachers, so other teachers may be unaware of it,[208]

The guidance begins with the definition of a parent from **Section 576** of the Education Act 1996 which includes,

- all natural parents, whether they are married or not; and
- any person who, although not a natural parent, has Parental Responsibility for a child or young person; and
- any person who, although not a natural parent, has care of a child or young person.

Next, the guidance provides a definition of Parental Responsibility (PR) and the ways in which it may be acquired, and notes that not only parents may have this but that PR for a child may also be acquired by a local authority through a Care Order. A local authority with PR can prevent a parent having contact with their child, even though the parent also has PR. Children may also be taken into local authority accommodation by agreement with the parents without a Court Order. Several people, including the LA, can thus be regarded in law as a child's parents.

The guidance goes on to discuss Section 8 orders and specifically the restrictions Prohibited Steps Orders and Specific Issues Orders impose on the exercise of Parental Responsibility.

A school must recognise that everyone with PR has the right to participate in decisions concerning their child's education, even if only one parent is the main point of contact with the school. They must treat everyone with PR equally unless they have been shown a Court Order restricting a parent's PR; this must include,

- Providing parents with information, such as copies of the governors' annual report, pupil reports and attendance records;
- Enabling parents to participate in activities, such as voting in elections for parent governors;
- Asking parents to give consent, for example to their child taking part in extra-curricular activities;
- Telling parents about meetings involving their child, such as a governors' meeting on the child's exclusion.

[208] http://www.education.gov.uk/sandboxagamemnon/families/a0014568/parental-responsibility

Head teachers must ensure that they have the full names and addresses of all adults who have PR when the child is enrolled. They must also have details of any Court Orders which affect the parents' exercise of PR. These records must be kept up-to-date and made available to the child's teachers; they must be forwarded to the new school should the child change schools.

Schools are advised that though a resident mother may ask a school to change her child's name in its records she may not legally do so without the consent of all those with PR. The school must have evidence of this consent in writing, or a Court Order. A letter from the mother's solicitor carries no legal authority. If the name has already been changed then it may not be in the child's best interests for it to be changed back.

Note: that if you need to show a school a copy of a Court Order you will need the consent of the Court, otherwise you could be in contempt.

If a school hasn't been given the contact details of a non-resident parent it must remind the resident parent that the non-resident parent has the right to be involved in the child's education and request to be given the contact details. A school can do nothing if the resident parent refuses, but if the non-resident parent contacts the school directly the school must cooperate with them.

Generally a school will need the consent of only one parent unless the activity will have 'a long term and significant impact' on the child or if the non-resident parent has informed the school that he wishes to be approached for consent in all such cases. Sometimes one parent will give consent and the other withhold it; this puts schools in an awkward position, and they are advised that the best decision to take is that the child should not participate in the activity. The school would not be taking sides, merely protecting itself from possible legal action should, for example, the child be injured on the trip. The resident parent could be recommended to seek a Court Order to clarify the situation.

Schools are *in loco parentis* for the children in their care and, though they do not have PR for a child, in the event of an accident or the need for emergency medical treatment are enabled by **Section 3(5)** of the Children Act to 'do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare', for example, taking a child to hospital to have a wound stitched. The parents must then be kept informed as soon as possible, so that they can take responsibility for any further decisions necessary.

Schools are obliged by the Children Act to make the child's welfare paramount; where a parent's action makes this difficult the school should seek to resolve this with the parent, but should avoid becoming drawn into any conflict.

Although the school must treat you equally, it is only obliged by regulations to issue one copy of a child's educational record or school report; they may charge for further copies but not beyond the cost of supply, so offer to pay for them, and provide the school with a dozen stamped, addressed envelopes. Even if you don't have contact you've a right to this information under the **Education (Pupil Information) (England) Regulations 2005**.

They can only provide you with information to which your child has a right of access. Provided that requirement is satisfied, they must make your child's educational record available to you, free of charge, within 15 school days of receipt of your written request. If you want a copy they can make a charge to cover their costs. This rule does not apply to nursery schools.

Don't be excluded from your child's education: go to the school, introduce yourself, arrange a meeting with the head, explain your situation. Your child's other parent may try to demonise you, don't argue with them: join the Parent Teacher Association, turn up at curriculum evenings, get to know all your child's teachers and discuss progress with them, etc. Become a good, involved parent; demonstrate that your ex is wrong to exclude you; above all, don't be seen to criticise them to the school. As with doctors, the more involvement you have the better it will appear in Court, and the better a parent you will really be.

At the next governors' or PTA meeting ask how the school ensures that any prospective admissions are done with the knowledge of both parents; i.e. do they attempt to ensure that they have the names and addresses of both parents? If your child's other parent does not give your name and address when they are requested (or claims you are not interested) he or she is acting fraudulently. Remember that in many schools family breakdown is the norm rather than the exception and they really should be geared up for this.

Again, in practice the school will tend to follow the wishes of the resident parent and behave as if you don't exist; it will prove a challenge for you to obtain any information from them. Receiving an annual school report will come to seem a significant achievement. Schools are often ignorant of the law and misconceptions are common; it is a common (but false) belief, for example, that they can only send out a school report to the non-resident parent with the permission of the resident parent.

Local authorities tend to act on a case-by-case basis; they won't always accept a solicitor's letter, and may demand to see other evidence (birth certificate, Court Order). If you persist they may well forward the matter to their legal department. Take your case to the local education authority rather than to the school; it will be their department which will have to pay the legal costs should you come over all litigious, and they probably can't afford it.

Refer them to the guidance above; it's doubtful if it is legally enforceable, but it has helped in a number of cases; remind them that if something happened to your child on a school trip to which you had not given your consent you would sue. An alternative is to phone the helpline of the Department for Children, Schools and Families on 0870 000 2288 and ask them to remind the school of their obligations.

You can use as a precedent Re H (A Minor) (Shared Residence) 1 FLR [1994] 717 in which Cazalet J ruled,

> *Whatever the situation may be thought to be by those concerned in meeting the father's requests, I point out that the father, having obtained a parental responsibility order pursuant to s 3(1) of the Children Act 1989 is entitled to all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child. The father*

is accordingly entitled to the same rights as the mother in regard to the receipt of any reports or documents which, for example, the school or doctor may hold.

A few more tips on schools which have worked in some cases:

- Insist that the school registers your child using the name on the birth-certificate (this is a legal requirement);
- Get involved in every school outing you can, for example by providing transport (you will have to be CRB checked)
- Offer to take photographs on outings and sports days, and give a spare copy or disc to the principal;
- Turn up for every school event, whether invited or not;
- Offer to man a stall on school fairs day, or on fundraising days;
- Write to the school on a regular basis thanking them for all they are doing for your child (don't phone – keep everything in writing and take copies);
- Make sure you have a record of your involvement, including photographs, so that you can present it as evidence to the judge in Court.

3.2.5. Local authority housing

One of the *Catch 22* situations in which fathers frequently find themselves is that if they cannot provide appropriate overnight accommodation for their children they will not be granted overnight staying contact, much less shared residence. Local authorities will be reluctant to help out with this.

Consider the case of Edward Holmes-Moorhouse who had a Shared Residence Order for three of his children, stating that the children should spend alternate weeks and half of their school holidays with each parent. Unfortunately the Court also ordered the father out of his home.

The father applied to Richmond Borough Council for assistance under Part VII of the Housing Act 1996, which imposes duties on a housing authority in respect of accommodation for people who are homeless or threatened with homelessness. The council accepted that the father was threatened with homelessness but not that he had priority need. Section 189(1) of the 1996 Act listed the categories of persons who had priority need. Section 189(1)(b) included 'a person with whom dependent children reside or might reasonably be expected to reside'.

The council argued that if it was obliged to provide a second home for the children they could not reasonably be expected to reside with their father. The council was not constrained by the Children Act to consider the best interests of the children; it had merely to operate under the Housing Act.

The father appealed the council's decision but his case was dismissed by Judge Oppenheimer at Brentford County Court; the father appealed successfully in the Court of Appeal ([2008] 1 WLR 1289) but this decision was overturned when the council appealed in the House of Lords (Holmes-Moorhouse v LB Richmond upon Thames [2009] UKHL 7).

> *The question which the housing authority therefore had to ask itself was whether it was reasonably to be expected, in the context of a scheme for housing the homeless, that children who already had a home with their mother should be able also to reside with the father. In answering that question, it would be entitled to decide that it was not reasonable to expect children who were not in any sense homeless to be able to live with both mother and father in separate accommodation.*

The parents returned to Court complaining that the council had made implementation of the Shared Residence Order impossible; the Court recorded its concern in a further order that through no fault of either party the SRO had not been implemented. The children (presumably; – it is not recorded) remained with their mother. Baroness Hale concluded:

> *Family Court orders are meant to provide practical solutions to the practical problems faced by separating families…… Ideally there may be many cases where it would be best for the children to have a home with each of their parents. But this is not always or even usually practicable. Family Courts have no power to conjure up resources where none exist.*

This case reveals much that is wrong with the family justice system, from the casual assumption that ordering a father out of his home is acceptable, through the absence of any consideration of the viability of an order, to the failure of the highest court in the land to offer any solution more constructive than its 'concern', and the lack of coherence and integration in legislation.

3.2.6. Flexible working

If you wish to become fully involved in your child's life and share parenting you may need to adjust your working hours. Under the **Employment Act 2002** you have the right to ask your employer to vary your contract of employment to enable you to care more effectively for your child's needs. Your employer is obliged to take such an application seriously, and if it is refused, he or she must give reasonable grounds.

You are entitled to request changes to the hours you work, the times you work, or your place of work. Flexible working can include working from home, job sharing, taking time off in lieu, teleworking, team working, staggering your hours and additional entitlement to leave.

To qualify:

- you must have a child under the age of 16 (or a disabled child under the age of 18);
- you must have legal responsibility for the child;

- the child must be living with you;
- the purpose of your request must be to care for your child;
- you must have worked for your employer for 26 weeks; and
- you must not have made an application in the previous 6 months.

You should make the application in writing to your employer and state that it is an application to change the terms of your employment, specify the changes you want and their date of commencement, explain the impact you anticipate on your employer's business and suggest ways to mitigate that, and explain why you need those changes to be made.

If your application is reasonable and reasoned your employer should agree to it. If not, he must invite you to a meeting within 28 days to which you can bring a colleague. Within 14 days he must either agree the original proposal, agree a revised proposal discussed at the meeting, or give clear business reasons why he cannot agree to a change in your working. You must then be allowed to appeal within a further 14 days.

Reasonable grounds to refuse your request are:

- the burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to re-organise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work;
- planned structural changes; and
- such other grounds as the Secretary of State may specify by regulations.

If your employer refuses your request there are various sources of advice you can approach,

- your union if you have one;
- the Citizens Advice Bureau;
- a solicitor;
- ACAS – if they conclude your employer has acted unreasonably they can order him to reconsider and award you compensation;
- an employment tribunal.

Your employer may reasonably reduce your pay and/or benefits, but cannot dismiss you or treat you unfairly for making the application.

3.2.7. Taking children abroad

Whether you can take your child abroad on holiday is one of the most common questions separated parents ask.

Anyone with Parental Responsibility for a child can apply for a passport for him. It is not necessary to have the consent of the other parent. If you are a father applying for a passport for your child, however, you are likely to be challenged. Ownership of the passport belongs to the Home Office, not with the parent with residence or who paid for it. If there is likely to be a dispute over the passport you can lodge it with a solicitor for safe keeping.

Section 13 of the Children Act provides that *if there is a Residence Order in force*, the **resident parent** (which means either parent if the order is for shared residence) may take the child out of the country for **up to one month** (28 days) without the consent of the other parent or persons with PR. For periods longer than this, or if the period coincides with a time when the child is meant to be with the other parent, they must have either the written consent of all those with PR or the leave of the Court. In the case of a Special Guardianship Order the period is three months.

Under Section 1 of the **Child Abduction Act 1984** it is a criminal offence for a parent or guardian to take or send a child abroad without the consent of all those with Parental Responsibility for him or the leave of the Court. It is not an offence if the period is less than a month or if the person taking the child has a residence order in his favour.

If there is no Residence Order in force, even if the father doesn't have PR, removal out of the country can still constitute 'wrongful removal' and he can start child abduction proceedings under the Hague Convention on International Child Abduction. Removal is likely to be wrongful if the father is having contact, if there is a Contact Order in force or if there are ongoing proceedings.

It is also a criminal offence to remove a child if there is a Prohibited Steps Order in force, or if there is a Contact Order in force and removal breaches its terms.

If the other parent unreasonably withholds consent, or will not discuss the matter, no offence is committed. In practice if a **mother** takes her child abroad without the father's consent she is taking him on holiday; if the **father** takes him abroad he is abducting him and all hell will break loose. The law and practice on Parental Responsibility are not gender-neutral. **Note**: that some countries now will not allow a lone parent with a child to enter the country unless there is written authorisation from the other parent.

If you want to take your child abroad and the other parent won't agree you need to plan far ahead and make a **Specific Issues** application to the Court giving the reason for the trip, where you will be staying, who will be going, and what provisions you will make for contact. It may be appropriate to make the Court an **Undertaking** to return the child on a specific date. If you breach the Undertaking it is a criminal offence, which may give the other parent some assurance that you really will return the child.

Be wary of taking your child abroad even if the trip has been agreed with the other parent – it's not unknown for resident parents to agree to such trips and then promptly get a **Prohibited Steps Order** or contact the police and allege abduction. If in any doubt about what is legal or reasonable, apply to the Court for leave. If you don't take these precautions you may find yourself unable to go on the planned trip and you will have wasted a lot of money.

Either parent can make an application 'without notice' if the matter is urgent.

A contact parent may not take a child out of the country without the resident parent's consent, but it is possible to have a direction added to the order to allow you to take the child abroad for contact purposes (if you live abroad, for example), so that you don't need to get the resident parent's permission each time. If you don't have such a direction and the other parent objects, you'll have to apply to the Court and show that it is in the child's best interests, and your ex will have to show that it is not (they'll probably claim you intend to abduct the child).

Read **Chapter 14** on Relocation for more information about preventing the permanent removal of children.

3.2.8. Photos of your children

Contrary to growing popular belief driven by paedophile hysteria there is no law (yet) which prevents anyone from taking or using a photograph of any child provided it is not indecent, or manipulated in a way which makes it indecent. The **Protection of Children Act 1978** does not define indecency and leaves it to the jury.

Deliberately taking photographs of children in a public place will draw attention to you and possibly the attention of the police; in Scotland you could be committing a breach of the peace. Many organisations will also have policies on photographing children at organised events; even if the children are your own you should find out what rules are in place before getting your camera out. It is always a courtesy to ask a parent's permission before photographing their child, but not legally mandatory.

Potentially, photography could be considered **harassment**, if for example you were to take photographs of someone against their will, and as with other forms of harassment only two incidents are necessary to constitute a course of action. The European Convention on Human Rights also protects an individual's right to respect for his private life, and breach of this could be an offence. If for example you were to take a photograph of your child in his home using a telephoto lens from a location outside his home, that would be an invasion of his privacy; so too might be taking a photograph of him in the street, depending on circumstances. As a child does not have the legal capacity to give consent, the consent of a parent or guardian must be obtained in writing.

It is entirely legal to post photos of your child on a website. In individual cases some parents have been threatened by the judge; one father reported that at his hearing he was threatened with imprisonment if he did not take pictures of his children off his personal website. He had to remove them because they were allegedly

causing distress to the mother. He was also ordered to remove some campaigning material. The judge threatened that if the offending material was still on his site when he next returned to Court she would send him to prison. Such conditions are enabled by Section 11 of the Children Act.

The only offence would be if you identified your child as being the subject of court proceedings – that would breach Section 97 of the Children Act, although no known prosecutions have followed. The solution is probably to put photographs of your child onto someone else's website and deny that you have any knowledge of them and that you have no control of who puts them on the site. That way you frustrate the judge, you annoy the other parent and there is nothing they can do. But if you have done nothing wrong why react at all?

Post the details of the judicial abuse of power together with the judge's name and contact details on your web site. The judge may then wish to refer you for contempt. Where the County Court has no jurisdiction to punish you for contempt then the judge must refer you to the High Court Queen's Bench Division. In fact as there has to be a prosecutor, the referral would be to the Attorney-General to take proceedings (unless the other party in the case was willing to institute proceedings), or possibly to the Official Solicitor.

3.2.9. Abortion

Abortion is treated by the **Abortion Act 1967** as a purely medical matter between a woman and her doctors. Fathers have no right in law either to insist on the abortion of children they do not want, or to prevent the abortion of children they do want.

There are three relevant precedents which all involve fathers trying to prevent the abortion of their children; in the first, Paton v BPS [1978] 2 All ER 987, a father, William Paton, argued that he had a right to a say in what happened to his child, and that the mother was seeking the abortion out of vindictiveness and spite in the context of a failing marriage. The Court disagreed: the law is quite clear: a foetus has no human right to life before it is born; a father has no legal right to prevent its abortion. The father took the case to the European Court of Human Rights – Paton v UK [1980] EHRR 408 – and again the Court rejected the idea that a father has the right to be consulted.

In the second case, C v S [1987] 2 WLR 1108, 1 All ER 1230, brought by Robert Carver, president of the Oxford University Pro-Life group, the father failed to persuade the judges that abortion would be a crime under s.1(b) of the **Infant Life (Preservation) Act 1929** given that the foetus was at a stage where it could survive outside the womb: such a prosecution had to be brought by the Director of Public Prosecutions and not by the father. Nevertheless, the pressure of the ensuing publicity forced the mother to abandon the termination and Carver raised the child himself.

Under the **Human Fertilisation and Embryology Act 1990** the 1929 Act no longer applies to abortion.

More recently, in 2001, Stephen Hone went to the High Court in a bid to stop his former partner, Claire Hansell, aborting their child. He argued that only one doctor had been consulted instead of the two required by law and claimed a 'partial victory' in court when the clinic said it would perform further medical checks before carrying out the termination, but Hansell's solicitors reported she had already aborted the child.

For fathers abortion is about ensuring the life of the child, and attempts made by them to prevent abortion challenge the conventional approach of the courts that a child's best interests are inseparable from those of its mother. In these cases it is the father who is aligning himself with the interests of the child, and demonstrating by doing so that the mother's actions are self-interested and in opposition to the child's welfare.

For the feminists, for whom the right to unchallenged abortion is non-negotiable, the issue is not about the child but about patriarchal men attempting to exert control over women's bodies, forcing upon them the traditional role of motherhood.

As it stands the law is inconsistent: denying men any say in the destruction of viable foetuses for whom they are prepared to take responsibility, but forcing them to pay child support when they are hoodwinked, as sometimes happens, into becoming the fathers of children they had no intention of having. If men are expected to take responsibility for any child they father, excluding them from a say in whether that child's life is to be terminated cannot be justified.

Bioethicist Jacob Appel argues, 'if one grants a man veto power over a woman's choice to have an abortion in cases where he is willing to pay for the child, why not grant him the right to demand an abortion where he is unwilling to provide for the child?'[209] Melanie McCulley, a South Carolina attorney, has argued that if mothers continue with a pregnancy when the father opposes it, men should be able to terminate their legal obligations in what she provocatively calls the 'male abortion'.[210]

3.2.10. Post-mortem PR

This case is really only a footnote, but I include it for the sake of completeness, and in the hope that it may be of help.

Stephen Blood died of meningitis in 1995 before he and his wife Diane could start a family. Diane campaigned successfully to have sperm taken from Stephen while he was still in a coma, in an act described by some as ethical rape (R v *ex parte* Blood [1997] 2 All ER 687 (Court of Appeal), [1997] 35 BMLR 1 (High Court and Court of Appeal)). The law at the time demanded the donor's written consent. Following IVF treatment in Belgium Liam was born in December 1998 and Joel in July 2002.

[209] Appel, Jacob M. *Women's Rights, Men's Bodies*, New York Times, December 2, 2005
[210] McCulley, M.G. (1998). *The male abortion: the putative father's right to terminate his interests in and obligations to the unborn child*. The Journal of Law and Policy, 7 (1), 1-55. Retrieved June 11, 2007.

In September 2003 Mrs Blood was finally successful, through instigating new legislation (**Human Fertilisation and Embryology (Deceased Father's) Act 2003**), [211] in having Stephen's name acknowledged on his sons' birth certificates. Until then she had had to leave the space for the father's details blank or write 'father unknown'.

Outside the House of Lords, Mrs Blood said: 'It's the right to tell the truth and it's also important to my children's paternal relations that they're acknowledged as the relations they are – my children have two sets of grandparents, not just one.'

It was estimated that this ruling could affect between 30 and 40 children each year.

3.3. Changing a Child's Name

3.3.1. A child's legal name

Unilaterally changing a child's name is an issue which regularly causes great distress and protracted litigation.

Your name is your identity; it is who you are. It provides a link to your father and your immediate forbears; it reverberates back through history. It provides information about culture, locality and occupation. At a time when tracing one's family tree is so popular it is the key which unlocks the records. Someone whose surname has been changed is set adrift in history, without heritage, and unable to pass their name on to posterity.

Though the point is seldom considered in a secular age, it is said that in English law to change the name given to a child at his baptism is unlawful since his name is given to him by God (See Re Parrott, Cox v Parrott [1946] Ch 183, [1946] 1 AllER321).

A child's acknowledged name is his name as it appears on his birth certificate; this is regulated by the **Registration of Births and Deaths Act 1953**.

- Where the parents are married it is the duty of either parent, to register the birth within 42 days;
- where they are not married the parents may register the birth together;
    - if the father cannot attend he must sign a statutory declaration acknowledging paternity which the mother must produce to the registrar;
    - if the mother cannot attend she must sign a statutory declaration acknowledging the father's paternity which the father must produce to the registrar;

[211] http://www.opsi.gov.uk/acts/acts2003/ukpga_20030024_en_1

If the father's details are not recorded they can be added later. Where a couple are not married the father must give his consent for his surname to be given to the child.

In 2008 the Government launched a consultation on proposals to change the registration rules to ensure that the 45,000 children registered each year without a father would be better protected. New rules would ensure joint registration between unmarried parents, though the emphasis was on enforcing responsibility.[212]

Unlike some of the other reprehensible things parents do to their children, changing a child's name is something only mothers do, simply because children usually carry their father's name; we are not aware of any case where a father has changed or sought to change a child's name in this way, although it is possible that where a child's birth is registered without the father, the father may be in a position to change the name at a later date.

3.3.2. Changing a name

The law in this matter is given in **Section 13(1)(a)** of the Children Act 1989 and is detailed in the Practice Direction *Child: Change of Surname*, 20th December 1994 [1995] 1 FLR 458. The Act states that where there is a residence order is in force with respect to a child the written consent of every person who has Parental Responsibility for the child must be obtained if the child is to be known by a new surname. Otherwise the leave of the Court must be obtained. The application to the Court must be made on **Form A55**.

Where there is no Residence Order, or where the other parent does not have Parental Responsibility, an application must be made for a **Specific Issues Order**. The governing principle must be that changing his name will be in the child's best interests; a father should be expected to give his consent in writing, even if he does not have PR.

Generally it is not possible to change the name on a child's birth certificate; there are, however, exceptions:

- The forenames may be changed within 12 months of registration;
- The surname may be changed from the mother's to the father's if
    - the father did not attend registration and both parents agree; or
    - the parents have married subsequent to registration.

A person's name can be changed by means of a Deed Poll: a document which forms a legal contract, binding upon only one person. It binds that person to a certain course of action, in this case to go by a different name. The Deed Poll is legal evidence that the name has changed, and a copy must be sent to everyone you wish to use the new name. This type of Deed Poll is called a Deed of Change of Name, and it obliges you to:

- Abandon all use of your old name;

[212] DWP White Paper, *Joint birth registration: recording responsibility*, June 2008, http://publications.dcsf.gov.uk/eOrderingDownload/birth_registration_wp.pdf

- Use only your new name at all times; and
- Require all other persons to address you by your new name.

If your child is under 16 you do not need his consent to change his name; if he is 16 or 17 you do need his consent, and if he is 18 or over he can change his own name without your consent.

It is very easy to change a child's name, and it can be done on the internet for as little as £3.99 using on-line forms. It can only be changed by those who have Parental Responsibility (PR) and the application must be accompanied by a letter of consent (not by fax or e-mail), which confirms that all those with PR have consented to the child's name change. Even if the father has no contact whatsoever with the child, as long as he has PR his consent in writing is still required to change the child's name. If the father withholds his consent the mother must apply to the Court for leave.

A name can be changed in any way, provided that it is not for fraudulent or illegal reasons. There are no legal limitations on what name you choose, but most agencies will not accept:

- Unpronounceable names;
- Names containing figures, punctuation marks or symbols;
- Vulgar or blasphemous names;
- Names intended to deceive by conferring title, honour or rank;
- Names which do not include a forename and a surname.

3.3.3. Reasons for change

There are some quite innocent reasons why a mother should wish to change the names of one or more of her children:

- she has children by several fathers, and wants them all to have the same name;
- she has reverted to her maiden name and wants her child to do so too;
- she has re-married and thinks it is embarrassing or confusing for the child's name to be different from the rest of his family.

These arguments should be resisted, but there are other, less innocent reasons why a mother should wish to do this:

- changing a child's name severs his final link with an absent or non-resident father;
- it can be used to persuade the child or other parties that the mother's new husband or partner is really the child's father;
- it makes it very much more difficult for a father who is being denied contact to find his child;
- it makes it more difficult for the child to find his father.

There is a more insidious way of changing a child's name which avoids the legal process, and therefore the necessity of obtaining the father's consent or a Court Order; it is common where contact between the child and his father is being prevented. In such a case the mother will encourage the child to use his new name, and to write the new name when at school. She will encourage members of her family and her friends and neighbours to use the new name. She will give the new name to schools, doctors and local authority agencies when registering the child with them.

If the mother has made false allegations of abuse against him to social workers or to the school many of these people may already have become prejudiced against the father; if he insists on the use of his child's correct name they may consider him to be acting unreasonably and selfishly, or out of antipathy towards the mother. Very often a father with only little or no contact with his children will not even be aware that this is happening. Fortunately changing a name in this way has no legal status and should not be accepted by the courts. Anyone who attempts to deny this should be referred to Section 13(1) of the Children Act 1989.

3.3.4. Stopping change

If the surname of your child is legally protected by a Residence Order you should initially write to the mother. If she is stubborn contact the school or doctor and remind them of the order, and ask them to amend their records accordingly. If the mother does not cooperate you'll have to apply to the Court to have the order enforced.

If your child's surname is *not* legally protected you will need to make a Section 8 application for a Prohibited Steps Order. If you are already making an application put this on your C100 form as a specific issue – you don't want to pay twice. You'll need to act swiftly; sometimes the courts have condemned the mother for her actions, yet allowed the change to stand on the grounds that to change it again would cause the child further disruption.

Schools are often surprisingly ignorant of the law and will agree to children being known by a new surname if the mother requests it. Don't vacillate, and follow the advice given above; write to the school, confirm that you have PR, state the situation, and inform them that it is an offence under Section 13 of the 1989 Children Act to allow a child to be known by a surname other than that on the birth certificate unless all parties with PR have agreed to the change, and ask for the name and address of their solicitor. Alternatively go straight to the LEA.

There is a special case which applies when a child has been born and has not yet been given a name. Again you can apply for a Prohibited Steps Order to prevent the birth being registered without you and to prevent the child being given a name against your wishes. This is a very constructive use of the **Prohibited Steps Order**.

3.3.5. Legal precedents

The judicial position on who may change a child's name in cases where there is no Residence Order is given by Holman J in Re PC (Change of Surname) [1997] 2 FLR 730,

> *Where only one person has Parental Responsibility for a child … that person has the right and power lawfully to cause a change of surname without any other permission or consent. Where two or more people have Parental Responsibility for a child then one of those people can only lawfully cause a change of surname if all other people having Parental Responsibility consent or agree.*

Thorpe reaffirmed this in Re T (Change of Surname) [1998] 2 FLR 620,

> *that consent of the other parent or the leave of the Court … was an essential prerequisite certainly where both parents have Parental Responsibility.*

Similar emphasis was given in Re C (A Minor) (Change of Surname) [1998].

Where there is dispute the case must be referred to the Court in order to stop parents constantly changing and re-changing the child's name; the foremost case is Dawson v Wearmouth. The mother had been married to Mr Wearmouth and had two children by him. When they divorced she and the children retained the surname of Wearmouth. Subsequently she met Mr Dawson, with whom she had a third child. When the third child was about a month old the mother and Mr Dawson separated. The mother registered the third child with the surname of Wearmouth (without Mr Wearmouth's consent) rather than Dawson so that she and her three children should all have the same name. She knew Mr Dawson wouldn't like this and he duly applied to the Court in order that his child could be known by his surname. The House of Lords refused his application.[213] The question, as always, was what was in the child's best interests. In this case the mother, Mr Dawson and the child had not really lived together as a family unit for any length of time. The mother not unnaturally argued that she and the two other children had one surname and it would do more for the unity of the family if all the children had the same surname. The Court agreed. Lord Mackay said:

> *The registration or change of a child's surname is a profound and not merely a formal issue … Any dispute on such an issue must be referred to the Court for determination whether or not there is a Residence Order in force and whoever has or has not Parental Responsibility.*

The problem with this solution was that while the first two children really were the children of Wearmouth, the third was not: giving him the same name was a lie, denying his real parentage and imposing a false one. One of the appeal judges, Lord Jauncey, dissented from the deciding view and it was his approach which showed the way courts would decide in future,

> *A surname given to a child at birth was not simply plucked out of the air. Where the parents were married the child would normally be given the father's surname or patronymic thereby demonstrating its relationship to him.*

[213] http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/dawson1.htm

> *…The surname was thus a biological label telling the world at large that the blood of the name flowed in its veins. Alexander had not a drop of Wearmouth blood in his veins.*

Since then judicial opinion has moved towards preserving a child's link (it may be his last remaining link) with his father. A guiding case is Re B (Change of Surname) [1996] 1 FLR 791 in which a mother applied to have the surname of her three children changed to that of the man with whom they had been living for seven years; there was no contact with the father, and the children had been alienated. J Wilson observed,

> *I do not think that to allow this change of name would be in the children's best interests. B is their father. And while, as I say, it may be true that the children will in fact insist on being called H, for me to allow this application would be to give the court's approval to a process which I do not believe is in their best interests. I think that in reality they are B and that this court should recognise that reality.*

In answer to the issue of embarrassment, the judge said,

> *Miss Woolrich* [Counsel for the mother] *resurrects the traditional argument that it is embarrassing for children to be known by a surname other than that of the adults in the household. But the law must not lag behind the times. In these days of such frequent divorce and remarriage, of such frequent cohabitation outside marriage, and indeed increasingly of preservation of different surnames even within marriage, there is, in my view, no opprobrium nowadays upon a child who carries a surname different from that of the adults in his home.*

He also quoted Buckley J in Re T (orse H) (An Infant) [1963] Ch 238,

> *it is injurious to the link between the father and the child to suggest to the child that there is some reason why it is desirable that she be known by some name other than her father's name.*

Current judicial thinking is neatly summarised by Butler-Sloss LJ in Re W, Re A, Re B, [1999],

> *(e) On any application the welfare of the child is paramount and the Court must have regard to the section 1(3) criteria* [i.e. the welfare checklist].
>
> *(f) Among the factors to which the Court should have regard is the registered surname of the child and the reasons for the registration, for instance the recognition of the biological link with the father. Registration is always a relevant consideration but it is not of itself decisive. The weight to be given to it by the Court will depend upon the other relevant factors or valid countervailing considerations which may tip the balance the other way.*
>
> *(g) The relevant considerations should include factors which may arise in the future as well as the present situation.*

(h) Reasons given for changing or seeking to change a child's name based on the fact that the child's name is or is not the same as the parent making the application do not generally carry much weight.

(i) The reasons for an earlier decision to change a child's name may be relevant.

(j) Any change in circumstances since the original registration may be relevant.

(k) In the case of a child whose parents were married to each other, the fact of the marriage is important and I would suggest that there would have to be strong reasons to change the child's name from the father's surname if it were so registered.

(l) Where the child's parents were not married to each other the mother has control over representation. Consequently on any application to change the surname of the child the degree of commitment of the father to the child, the quality of contact if it occurs between the father and the child, the existence or absence of Parental Responsibility are all relevant factors to be taken into account.

From this it will be seen that a court should only allow the change of a child's name **if so doing will improve the child's welfare**. This is the paramount consideration in all Children Act decisions and presents a usually insurmountable obstacle.

The second principle is that **the child's name has already been registered**. Anyone wishing to change the name will have to show why that registration was wrong or mistaken, or why the reasons for changing the name now override the reasons for the original registration. Hammer this point home. The fact that a mother has remarried since registration and now wishes to change her child's name to match her own (or those of children born subsequently) is considered unimportant.

Also look at R v R [1982] 3 FLR 345 and Practice Direction, *Child: change of surname* [1995] 1 FLR 458 which upholds the right of a father to be consulted over changing a child's surname.

Changing a child's forename is rarer than changing a surname; in Re H (Child's Name: First Name) [2002] 1 FLR 973 the Court held that the rules which apply to surnames do not apply to forenames, and that a resident parent can use whatever name she chooses.

3.4. Cases

Parental responsibility

S v S; W v Official Solicitor [1970] 3 ALL ER 107
Paton v BPS [1978] 2 All ER 987
C v S [1987] 2 WLR 1108, 1 All ER 1230
Re H (Minors) (Local Authority: Parental Rights) (No 3) [1991] Fam 251; 2 WLR 763
D v Hereford and Worcester County Council [1991] 2 FLR 205
Re H (Illegitimate Children: Father: Parental Rights) (No 2) [1991] 1 FLR 214
Re C (Minors) (Parental Rights) [1992] 1 FLR 1
B v B (A Minor) (Residence Order) [1992] 2 FLR 327
Re T (A Minor) (Parental Responsibility: Contact) [1993] 2 FLR 450
Re A (Minors) (Parental Responsibility) [1993] Fam Law 464
Re H (A Minor) (Parental Responsibility) [1993] 1 FLR 484
Re CB (A Minor) (Parental Responsibility Order) [1993] 1 FLR 920
Re E (A Minor) (Parental Responsibility) [1994] 2 FCR 709
Re G (A Minor) (Parental Responsibility Order) [1994] 1 FLR 504
Re H (A Minor) (Shared Residence) 1 FLR [1994] 717
Re S (Parental Responsibility) [1995] 2 FLR 648
Re H (Parental Responsibility: Maintenance) [1996] 1 FLR 867
Re H (Paternity: Blood Test) [1996] 2 FLR 65
R v ex parte Blood [1997] 2 All ER 687 (Court of Appeal), [1997] 35 BMLR 1 (High Court & Court of Appeal)
Re C and V (Contact and Parental Responsibility) [1998] 1 FLR 392
Re H (Parental Responsibility) [1998] 1 FLR 855
Re J (Parental Responsibility) [1999] 1 FLR 784
Re M (Contact: Family Assistance: McKenzie Friend) [1999] 1 FLR 75
R v Secretary Of State for Social Security Ex Parte W [1999] 2 FLR 604
Re X (Parental Responsibility Agreement: Children in Care) [2000] 1 FLR 517
Re M (Handicapped Child: Parental Responsibility) [2001] 2 FLR 342
Re D (Parental Responsibility: IVF Baby) [2001] EWCA Civ 230
Re H (A Child: Parental Responsibility) [2002] EWCA Civ 542, (Unreported) 15 April 2002
R (Rose & another) v Secretary of State for Health & another [2002] EWHC 1593; [2002] 3 FCR 731
Re M (Sperm Donor: Father) [2003] Fam Law 94
Sahin v Germany [2003] ECHR
Sommerfeld v Germany [2003] ECHR
A v A (Shared Residence) [2004] EWHC 142 (Fam), [2004] 1 FLR 1195
Re G (Children) [2006] UKHL 43
Re C (A Child) and XYZ County Council and E.C. [2007] EWCA Civ 1206
M v F and Others [2011] EWCA Civ 273, 1 FCR 533

Paternity fraud

Deek v Peek [1889]
S v S; W v Official Solicitor [1970] 3 ALL ER 107
P v B (Paternity: Damages for Deceit) [2001] 1 FLR 1041
Mikulic v Croatia [2002] 1 FCR 720

R (Rose & another) v Secretary of State for Health & another [2002] EWHC 1593; [2002] 3 FCR 731
A v B (damages: paternity) [2007] 2 FLR 1051
Re A (A Child: Joint Residence/Parental Responsibility) [2008] EWCA Civ 867

Changing a child's name

Re Parrott, Cox v Parrott [1946] Ch 183, [1946] 1 All ER 321
R v R [1982] 3 FLR 345
Re F (Child: Surname) [1993] 2 FLR 837
Re B (Change of Surname) [1996] 1 FLR 791
Dawson v Wearmouth, July [1997], 1 FLR 791, CA
Re PC (Change of Surname) [1997] 2 FLR 730
Re C (A Minor) (Change of Surname) [1998] 2 FLR 656
Re T (Change of Surname) [1998] 2 FLR 620

Dawson v Wearmouth [1999] House of Lords
A v Y (Child's Surname) [1999] 2 FLR 5
Re W, Re A, Re B, (Change of Name) [1999] 2 FLR 930
Re R (Surname: Using both Parents') [2001] 2 FLR 1358
Re H (Child's Name: First Name) [2002] 1 FLR 973
Re D, L & LA (Care: Change of Forename) [2003] 1 FLR 339, FD

CHAPTER 4: ALTERNATIVES

> *I cannot even say the words. A huge emptiness would well in my stomach, a deep loathing for those who would deign to tell me they would ALLOW me ACCESS to my children... Who the fuck are they that they should ALLOW anything? REASONABLE CONTACT!!! Is the law mad? Am I a criminal? This Lawspeak which you all speak so fluently, so unthinkingly, so hurtfully, must go.*
>
> Bob Geldof[214]

4.1. Alternative Dispute Resolution

4.1.1. Your options

If your child's other parent decides to obstruct or limit your role as a parent and you cannot resolve the matter yourselves you only have a handful of options available to you, and little choice as to which you use.

The worst, by far, is full scale litigation through the courts; we certainly don't recommend it, but you may be forced down this route against your will. If you do end up litigating you must decide whether to be represented in Court by a solicitor or to represent yourself.

With the demise of the Early Intervention initiative (see *Family Justice on Trial*) the only widely available alternative to litigation is appropriately named 'alternative dispute resolution' which comes in two varieties: mediation and conciliation. Under new rules introduced in April 2011 all couples will initially be obliged to consider mediation.

[214] Bob Geldof, *The Real Love that Dare Not Speak its Name*, p. 175 ff.

'Early intervention' should be the priority in all Family Court cases to prevent them reaching the point of intractability and **implacable hostility**. Instead, litigants must make do with a collection of compromises and half-baked ideas, which lack any consistency across the country, and do little to prevent protracted litigation.

The Court is actually required – under **Rule 1.4(2)(e)** of the Family Procedure Rules 2010 – to consider at every stage of proceedings whether alternative dispute resolution may be appropriate and to adjourn proceedings accordingly and give directions in the form of an order.

'Alternative dispute resolution' which takes place within the court process is known as 'conciliation'; resolution which takes place before litigants reach Court is known as 'mediation'. Other programmes imposed on blameless parents are 'parental education classes' and 'anger management' training. These combine to thrust onto the parent who didn't break the marriage contract and didn't want the divorce the blame for the relationship's breakdown; mediators told to be neutral are not allowed to discuss these issues.

Such programmes perpetuate the lie that breakdown results from warring parents whose failure to cooperate justifies the assumption of parental authority by the State machinery. The power imbalance is maintained and the parent who did not seek divorce is told he is 'angry', is humiliated, and is cast as dysfunctional and irresponsible because he is using his children as pawns in a war with the other parent – in reality it is the judiciary, lawyers and self-appointed 'experts' who use children as pawns.

Indeed lawyers' associations lobby governments to make parental education mandatory before parents can engage with the Court process: parents who want the relationship with their children restored must submit to state re-education to accept more submissively unilateral divorce and the abduction of their children.

We must be careful to distinguish therefore between mediation as it is currently devised and mediation as it could potentially work, as part of a reformed system of family justice in which both parents are treated equally, and in which the language of 'residence' and 'contact' is replaced by the concept of parents sharing the responsibility for bringing up their children in an arrangement which is usually termed 'shared parenting'.

Additionally, falling somewhere between these two options, is an arrangement called 'collaborative law' which can be thought of as a form of mediation using lawyers.

We recommend you to look carefully at all options and to get as much advice and as many opinions as you can before you make any decision – especially an irrevocable one. Do not depend on one source of advice only.

4.1.2. Mediation

It is tempting to view mediation as a potential panacea to disputes over residence and contact. On its own, however, it cannot work: as the US campaigner Stephen Baskerville has said, 'no rational party concedes anything in mediation that they know they will win in

court.'[215] As long as the courts offer a better deal than can be achieved through mediation, the party with the upper hand, normally the resident parent, will have no incentive to compromise. It is easy then for the resident parent to allow only intermittent contact, because she or he knows that this will also be the outcome of any court application.

In this environment, mediation becomes just another string to the lawyer's bow: another way to draw in the unsuspecting and take their money, while appearing to offer something different and non-adversarial. Some critics represent mediation as a way to soften up litigious fathers to accept the new divorce regime, or say that since it takes place without proper judicial oversight or rules of evidence it is a mechanism for avoiding the due process of law. Mediation becomes yet another level of patronage for the judge to confer; another costly imposition which, along with divorce, can be forced on the parent who desires neither, with the threat that contact with his children will be withheld until he capitulates, and agrees to pay these people he never chose to employ.

Despite this, mediation has considerable advantages over the only real alternative, protracted litigation. The average cost of legal aid in non-mediated cases involving children is £2,823, compared with £535 for mediated cases.[216] Non mediated cases take an average of 435 days to resolve, compared with only 110 days for mediated cases. No wonder solicitors steer their clients away from mediation, so that it is used in only 12.7% of cases.[217]

Fathers 4 Justice have always believed that mediation should be mandatory. This is a controversial position: many argue that mandatory mediation is a contradiction in terms: that couples cannot cooperate if they do so under any sort of coercion. They say that it is the essence of mediation that it be voluntary and consensual.

We would argue, however, that if couples were able to cooperate they wouldn't be in the family justice system in the first place. By the time couples require mediation there is already an element of antagonism, and many parties attend mediation only to find that their former partner does not turn up, or does not enter into negotiations constructively, trusting, no doubt, that they will get a better deal if they hold out in Court.

Parties intent on obstructing contact between their child and the other parent or on exploiting the court process will be unlikely to engage in mediation enthusiastically. The ability of a court to mandate it would initiate a process, therefore, which would not otherwise take place. There needs to be an end to the option an obstructive party has of going to Court to get the best outcome for themselves, irrespective of their child's interests.

Mediation has a number of advantages over solutions reached through litigation:

[215] Stephen Baskerville, *Taken into Custody: the War against Fathers, Marriage, and the Family*, Cumberland House, 2007
[216] Ministry of Justice
[217] Figures from The National Audit Office, *Legal aid and mediation for people involved in family breakdown*, 2 March 2007, http://www.nao.org.uk/publications/nao_reports/06-07/0607256.pdf

- Resolution achieved through mediation is a cooperative solution agreed between the parties themselves, rather than an order imposed by a court as part of an adversarial process;

- It is therefore be more likely to be successful both in the short and the long term;

- It teaches parents that the Court will not tolerate them putting their own needs before those of their children;

- Mothers win better outcomes from mediation than from litigation;

- Couples who mediate are much less likely to return to court;

- A Canadian study [218] found mandatory mediation led to swifter resolution of cases, decreased costs, both to the parties and to the taxpayer, and a higher rate of settlement.

We believe, furthermore, that agreements reached through mediation should be substantially binding, with penalties imposed on whichever party breaks them. Entry – or re-entry – into litigation would be permitted only if the circumstances of either party changed significantly or if one party seriously or repeatedly breached the agreement. If that sounds severe, consider the similar arrangement in **collaborative law**, in which both parties and their lawyers sign a Participation Agreement, breach of which results in the disqualification of the lawyers from that case.

Almost inevitably feminists and other supporters of the status quo oppose mandatory mediation; let us look at some of the arguments they use,

- *Taking disputes out of the courtroom and into mediation trivialises them.*

  This perspective is mistaken: the aim of mediation is to minimise the dispute, not trivialise it. We don't consider that custody and contact are matters appropriately resolved through the legal process; we think rather that they should be regarded as child protection or public health matters. This doesn't trivialise them, it simply places them in the correct context for effective resolution. The feminists' desire to keep these disputes in the legal arena has more to do with exploiting decades of successful manipulation of family law.

- *Mothers are the dominant parent in court-centred legal disputes, but they are forced into equality in disputes settled through mediation, and their specific concerns are diminished.*

  Our response to this is that it places the perspective of one parent involved in the dispute – in this case the mother – before that of the child. In contact and custodial disputes the interests of the child are held to be paramount.

[218] Robert G. Hann & Carl Baar, *Evaluation ofthe Ontario Mandatory Mediation Program (Rule 24.1):Executive Summary and Recommendations*, the Ontario Ministry of the Attorney General, March 2001, http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/exec_summary_recommend.pdf

- *Mediation is conducted in private whereas litigation is more public and accountable. This means that mothers' concerns are hidden from view.*

  Again this perspective favours the adults and not the children in the case; it also misapprehends the reason why litigation should be conducted publicly. There is a justification for ensuring that the outcomes of litigation be open to analysis and accountability, not because it ensures that specifically female issues are made public, but because it guarantees that children's interests remain paramount. It is important that the outcomes of mediation should be recorded, and that mediators be held accountable for their work.

- *Taking disputes out of a legal setting risks abandoning women's legal rights.*

  The same objection could be raised over men's legal rights, but once again we must remind these enemies of mediation that it is the rights of children which should be paramount. It is difficult to see how properly negotiated mediation could infringe the rights of either adult.

- *Mediation is inappropriate where there is proven abuse.*

  We would entirely concur, but equally, false allegations of abuse must not be used to prevent mediation. It would be impossible in cases of genuine abuse or domestic violence, from either parent, for there to be effective and willing cooperation, and we would not expect mediation to be mandated in those circumstances.

- *Mediation is biased towards shared residence.*

  Mediation is child-centred and thus emphasises the need of the child for a continuing relationship with both parents. Quite properly, mediation rejects the paradigm which has existed hitherto in which one parent has the upper hand. Any objective system aimed at securing children the best outcomes following divorce and separation should be biased towards cooperative parenting.

A new Pre-Application Protocol for Mediation Information and Assessment obliges parents to 'consider' mediation before they will be allowed to use the Court process; we describe it fully in **Chapter 9**.

4.1.3. Conciliation

Conciliation is a form of alternative dispute resolution which takes place in court and is provided by CAFCASS. Because of this there is the inevitable 'postcode lottery' for access to provision.

As it is currently structured we cannot recommend that you use conciliation. A report [219] in November 2007 into the long-term outcomes of in-court conciliation showed disappointing results. The conciliation covered by the report was a brief, usually one-off session of guided negotiation within the court premises designed to prevent further litigation. The brevity and limited availability of this type of

[219] Trinder, L. & Kellett, J., *The longer-term outcomes of in-court conciliation*, Ministry of Justice Research Series 15/07, University of East Anglia, November 2007, http://www.justice.gov.uk/docs/211107.pdf

conciliation imposes considerable pressure on parents to reach an initial deal, and an earlier report had shown high levels of short-term agreement.[220]

The report was based on telephone interviews with a small sample of 117 parents two years after conciliation; no attempt was made to view court records. Many reported that the two year period had been 'turbulent', 60% of agreements made had been abandoned or had broken down, 'a majority of parents had required further professional intervention and 40% had been involved in further litigation'.

Most parents commence the court process to re-establish frustrated contact, and the report found conciliation had delivered a level of contact broadly comparable with the general (non-court) population. Not surprisingly, it found that contact was more likely in cases which had been easy to start with, and was not taking place in more intractable cases, showing the very limited ability of the courts to deliver contact. This is despite the allegation that the courts prioritise contact over the resolution of parental conflict.

Levels of contact rose significantly immediately after conciliation but then fell back to pre-court levels by the time of the two year follow-up. Most parents still distrusted the other's parenting ability and reported children reluctant to transfer from one parent to the other. The median level of contact was still only half that recommended as necessary to maintain a relationship and was declining over time.

Most parents were in a state of 'weary resignation': contact was still beset with problems, but they didn't see further litigation as the solution. The main reason for this was the emotional cost, 'the sheer horror or the emotional and physical impact of being involved in court proceedings'.

Coupled to this was the sense that litigation had been largely ineffective, and that more of the same would be futile, 'The underlying problem identified by parents was that Court Orders were not being adhered to, either fully or in part... Little faith was placed in the court's ability to change the situation.' Some parents found the court process so stressful they had been forced to seek alternative means to achieve solutions, and there was thus a 'paradoxical assistance' from the courts.

Two years on, relations between parents were no better, and frequently even worse, leading to poor joint decision making. The conciliation process was not enabling parents to renegotiate new agreements, and they were resorting to more litigation, which made relations worse. This fact alone shows that the Court is not the best place to resolve these issues. Most alarmingly the report found no improvement in child wellbeing, due to continuing conflict between parents in three quarters of the cases.

The report reveals that conciliation can deliver a form of short-lived conflicted contact, but it does not offer the type of therapeutic intervention necessary to enable parents to parent cooperatively, 'in contrast, mediation with a clearly therapeutic orientation and emotionally-informed content can have a profound and enduring impact on relationships'. If parents believed there was anything to be gained

[220] Trinder, L., Connolly, J., Kellett, J., Notley, C & Swift, L., *Making contact happen or making contact work? The process and outcomes of in-court conciliation*, London, Department for Constitutional Affairs, March 2006, http://www.dca.gov.uk/research/2006/03_2006.pdf

by it re-litigation rates would be much higher than they are. For the UK family justice system, conciliation represents the state of the art; it has been touted by CAFCASS as a new and effective solution to contact disputes. This report shows it is nothing of the sort. It doesn't work.

4.1.4. Collaborative law

Collaborative law is a process of dispute resolution introduced to the UK from America in 2003 in which both parties instruct lawyers, but instead of fighting it out in Court they meet together to resolve matters face to face. The process is still governed by the legislation which applies to litigation in Court.

4.1.4.1. The process

- First of all you and your former partner each find a collaborative lawyer.
- You each meet with your lawyer and discuss the options and procedures available. The lawyer will explain what to expect in the 'four way' meetings you will be having and what you need to do to prepare. Sometimes a case will not be suited to a collaborative approach.
- The two lawyers will telephone each other to arrange the first meeting.
- At the first meeting it will be explained to you that you are making a commitment to resolving your differences without going to Court, and that you will act in good faith. All four of you will sign a Participation Agreement to this effect. This reassures you that your lawyers are not going to push you both into litigation at the first opportunity.
- If either of you commences court proceedings the collaborative lawyers will be disqualified from acting for you and you will have to find new lawyers (or represent yourselves). It is this feature of collaborative law which makes it so successful.
- If one of the parties fails to act in good faith, or fails to disclose financial information, for example, under the Participation Agreement their lawyer must withdraw from the process. Under the same agreement you can withdraw if you feel the other party or one of the lawyers is not acting in good faith.
- You will discuss what you each want out of the process and plan an agenda for the next meeting.
- At subsequent 'four way meetings' you will discuss concerns and priorities in a non-confrontational manner. The meetings are minuted and action points will be agreed on. It may become necessary to involve other professionals to help you resolve disagreements over finances or children; there are various options:
    - Collaborative coaches – they are health and social welfare professionals who will try to work with you to reduce conflict;

- Child specialists;
- Couple therapists – the emphasis is more on you as a family than on only promoting the interests of a single child.

- At the final meeting a document will be drawn up including all the points on which you have agreed and you will both sign it. This can be submitted to the Court and drawn up into an order. You will not need to attend. A timetable can be drawn up for the implementation of what you have agreed.

- As with any negotiated agreement, if new evidence emerges which was not disclosed during the collaborative process, you can seek to overturn the agreement.

4.1.4.2. The advantages

- Research by the family lawyers association *Resolution* showed an 85% settlement rate for the 2006/07 year.

- Meetings are held in a dignified atmosphere of mutual respect and creative cooperation. The aim is to resolve problems and establish a secure foundation of cooperation for the future.

- The process is far less stressful than Court, and puts parents in control. You will be negotiating in an informal setting, and won't have to learn how to address the Court in a formal and artificial manner.

- The process is entirely private, and is not subject to the pressure the Family Courts are under to conduct proceedings openly.

- A collaborative lawyer can give you legal advice, unlike a mediator. Each lawyer represents the interests of the paying party, unlike a mediator who must try to remain neutral. Even if you use a mediator you will still need legal advice before agreeing anything.

- A collaborative lawyer can prepare all the necessary court documents.

- The needs of your children are prioritised; the disagreements between adults cannot achieve the prominence they do in Court.

- All the facts, uncertainties, fears and differences are brought out into the open and are fully discussed. All participants maintain respect for each other and self-esteem is preserved. This contributes to more productive discussions and swifter and easier resolution.

- You are in control at all times, and the process will take place at a speed which suits you both; you are not handing over your parental responsibilities to a judge. In Court you are at the mercy of the Court's timetable, and subject to the endless delays which the system seems powerless to avoid. Once you start the court process it is very difficult to regain control: you are whirled along in an irresistible dance from which there is no chance of escape.

- If one party is absent from a court hearing, for whatever reason, it may still go ahead, and reach a decision contrary to the

interests of the absent party; at 'four way meetings' all four participants must be present.

- There is no exchange of letters, no writing of position statements which get batted to and fro, no bundles, no affidavits. Everything is discussed face to face and agreed on before progressing further.

- You and your former partner are likely to retain a friendly and cooperative relationship.

4.1.4.3. The drawbacks

- You must both want a dignified and cooperative resolution of the issues between you. If one of you abandons that approach then the whole process is wrecked. Obviously the less equitable arrangements offered by the courts can be a powerful temptation.

- Legal aid was never made available for collaborative resolution – this is an absolute scandal. Collaborative law would have used public money far more effectively than adversarial litigation.

- You must still use a lawyer and cannot represent yourself. But is that really a drawback? Representing yourself in Court is a nightmare and rarely wholly successful. Collaborative law is potentially expensive, but so is the court process however you do it, and you won't have to pay for applications. Remember that if you end up in Court your collaborative lawyers will lose their clients and have to hand over to someone else.

- If it fails you will end up in Court, but there is no way around that, and if you have acted in good faith, that should earn you Brownie points.

4.1.5. Litigation

If alternative dispute resolution fails, you have no choice but to resort to full litigation in Court. Most of the remainder of this e-Book is dedicated to this task, and we shall guide you through it step by step: what order to apply for, how to apply, what to do if a Court Order is not followed, how to appeal, etc. Your first decision will be whether you want to be represented in Court by a solicitor, possibly paid for through legal aid, or whether you wish to represent yourself, with the assistance of a McKenzie Friend. Don't make that decision until you have read the rest of this chapter and, preferably, the rest of this guide.

You are strongly advised to explore every option before going to Court. Not since the 17th Century witch-hunts sanctioned the murder of tens of thousands of women and men across Europe and America have courts of justice been so misused to dispense misery so widely and on the basis of false allegations and unscientific superstition.

Court is rarely the answer parents are looking for. It is immensely expensive, wearying, bewildering and frustrating. Cases can last for years, and most of that time your case will be making no progress, locked into the delay which has become so characteristic of every step of the process. Going to Court will destroy any surviving remnants of trust and communication. It won't make anyone behave

more responsibly. Court orders are not monitored and compliance is very difficult to enforce. Consider all other options carefully before going to Court.

Unlike all the other options for dispute resolution, if you opt for litigation your lawyer will actively discourage you from communicating with the other party. Unavoidably relations between you will break down, positions will become polarised and entrenched. The longer this continues the worse it gets; eventually resolution will become almost impossible to achieve.

Remember that no court necessarily dispenses justice; the difference between the Family Court and the criminal court and others is that the latter provide a final decision on a case: the Family Courts uniquely allow cases to rumble on for year after year and hearing after hearing with no obvious end in sight.

4.2. Lawyers

4.2.1. Don't use a solicitor!

It might seem strange that we should advise you to avoid precisely those professionals who should be expected to be of most help to you; there are a number of reasons for this:

- Solicitors are hugely expensive, between £200 and £500 per hour, and they charge in units of 6 minutes: a 7 minute phone call will be charged as 12 – i.e. £40 to £100. A year in the Family Court can easily cost between £10,000 and £20,000.

- This guide is the product of a campaign working to change the family justice system in this country which is robbing children of the right to have two loving, committed parents. Solicitors are sponsors and profiteers of this system.

- Solicitors adopt the ideology that divorce is always equally the fault of both parties: there is for them never an innocent or wronged party; concepts such as adultery, unilateral divorce or the breach of marital vows are meaningless and anachronistic.

- Solicitors conform to the political consensus that rising rates of fatherlessness result from fathers abandoning their children; as far as your solicitor is concerned, if you turn up in Court pleading for contact with your children, you have brought it upon yourself.

- Solicitors give advice which conforms to the artificial distinction between the contact and the resident parent; it will never be the best advice for you in your case. They will recommend contact, for example, when shared residence is more appropriate.

- Often you will not actually be paying for a solicitor, but for a 'legal executive'. These people are not qualified solicitors, though they work under the supervision of a solicitor and may become solicitors in due course. They lack the training and experience of a solicitor, and it seems to be the case that litigants are commonly misled into

paying for their services in the belief that they are paying for someone better qualified. They are regulated by **ILEX** rather than the Solicitors' Regulation Authority. Note that it is an offence to pass yourself off as a solicitor but not as a lawyer.

- Solicitors will only act on your instructions, though they may not make this clear to you, so you can be waiting for months for some action they will not take until you specifically ask them to.

- The first duty of a solicitor or barrister is to the Court and not to you. You need to understand this or their behaviour will appear perverse: they may, for example, disclose things about you to the other side which are potentially prejudicial to your case. If you don't want these things disclosed, don't tell your lawyer – better still, don't hire one.

In March 2007 the National Audit Office (NAO) unleashed a devastating report into the integrity of family law solicitors. Their report [221] for the Legal Services Commission – which provides taxpayer-funded legal aid to litigants – was prepared as part of the NAO's remit to ensure that taxpayers' money is being spent accountably. The report found:

- Legal Aid for family cases cost the taxpayer £328 million in 2005-06;

- that of 150,000 disputes taken into the Family Courts between October 2004 and March 2006 only 19,000 (12.7%) used mediation;

- Legal Aid funded solicitors were failing in their duty to advise their clients of the availability of mediation;

- the average cost of legal aid in non-mediated cases involving children was £1,746, compared with £726 for mediated cases, representing an additional annual cost to the taxpayer of £74 million;

- non-mediated cases were taking an average of 435 days to resolve, compared with 110 days for mediated cases.

In some jurisdictions, such as Australia, New Zealand and Norway, 'the benefits of mediation are regarded as sufficient to justify making mediation compulsory for separating couples who have disputes over custody of children'.[222] Not here: solicitors cynically put profits before the interests of their clients, steering them away from cheaper mediation into costly and protracted court battles. Edward Leigh, chairman of the Commons Public Accounts Committee, responded that they were 'cashing in by keeping quiet'.[223] He urged a crackdown on fat-cat lawyers who were 'happy to jump straight into the courtroom, leaving the taxpayer to pick up the bill'.[224]

[221] The National Audit Office, *Legal aid and mediation for people involved in family breakdown*, 2 March 2007, http://www.nao.org.uk/publications/nao_reports/06-07/0607256.pdf

[222] Ibid.

[223] Robert Verkaik, Independent, *Divorce lawyers 'put fees before clients'*, 16 October 2007, http://news.independent.co.uk/uk/legal/article3063805.ece

[224] Matthew Hickley, Daily Mail, *Divorce lawyers 'steer couples to court for profit'*, 2 March 2007, http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=439522&in_page_id=1770&in_page_id=1770&expand=true

A further report in 2009 showed that solicitors were over-claiming by £18.3 million for the work they had done; Edward Leigh said,[225]

> *There is something particularly unsettling about this because the overpayments are as a result of solicitors making claims for payment against the wrong kind of work - resulting in their receiving more money than they are due, or for claiming payment for work without evidence that it is eligible for legal aid support.*

The high rate of divorce and the generosity of the taxpayer have been very good for solicitors; in 1960 there was one solicitor for every 2,600 of the population; now it is one in 600. The implications for the general standard of education and intellect necessary to enter the profession are obvious.

The solicitor is the pupal stage of a politician; he is also an officer of the Court and as such has a duty to the Court and not just to his client; you are one case, the Court is his career, and possibly the launch pad for a political career. If you are publicly funded he owes a duty to the taxpayer and if he believes that you have less than a 70% chance of success then he must either withdraw from the case, or ask you to change your instructions to him: he has a theoretical responsibility to spend public money effectively. Following a ruling by Elizabeth Butler-Sloss in October 2003 solicitors are also now obliged to report any tax evasion which might emerge in divorce proceedings, for example paying a tradesman in cash.

[225] *Lawyers overpaid £25m in legal aid, finds National Audit Office*, Daily Telegraph, 29 October 2009, http://www.telegraph.co.uk/news/newstopics/politics/lawandorder/6461177/Lawyers-overpaid-25m-in-legal-aid-finds-National-Audit-Office.html

It is not unknown for **barristers** to stand up in Court and, just when a parent expects his case to be put, to tell the judge, often without asking for directions, that they are no longer accepting their client's instructions. The hearing must then be adjourned to give the parent a chance to find alternative legal representation, and if he is publicly funded and his original barrister has advised the Legal Services Commission, he will find that impossible. He will also find his former barrister has absconded with all his legal papers, and that he will have to pay to get them returned.

Having said all that, there may be rare circumstances where you cannot get the specific advice you need from any other source, and a solicitor may be your only option. In that case, use them for that specific question, while continuing to represent yourself. There are also specific types of case in which legal advice can be helpful, for example, when social services are threatening to take a child away or where you have been accused of causing non-accidental harm to a child. There is a new scheme some solicitors are running called 'Red File'. We have no experience of this and cannot comment on it, but it is based on a series of modules with a fixed fee for each rather than on an hourly rate.

4.2.2. Refusing instructions

A solicitor is entitled to refuse your instructions and if he is publicly funded he can refuse them if he believes that following them would give your case no hope of success; he has a responsibility to spend public money effectively.

Once a solicitor has agreed to take your case he is 'on record' on the court file. For him then to remove himself he must either persuade you to sign a release form or take directions from the judge. He must make an application to the Court which you can oppose. Under their code of conduct solicitors may only refuse to follow your instructions in certain circumstances. In order to ascertain whether or not they are reasonable they will take advice from a barrister. You will have to pay for this, so you must remain in the driving seat; your legal team are your employees, listen to their advice, but do not necessarily take it if it is not in your interest to do so.

Sometimes solicitors will threaten to cease acting for you if you seek advice elsewhere, for example, from a fathers' organisation. Do not accept this. Do not accept any conditions your solicitor seeks to impose on the work he does for you. You are the person engaging his services. You are the person giving the instructions. You are the person paying the wages even if you are receiving legal aid. A solicitor has absolutely no right to tell you that you can only take advice from them. Any sensible person faced with the kind of problems we are faced with in the Family Courts will seek ideas, suggestions and information from a variety of sources. Any sensible person would look at all the options and advice put forward before choosing the route that they themselves are most comfortable with. That then forms your instruction to the solicitor.

When a solicitor is determined to resist your instructions the approach is to advise him very carefully and specifically. You could also use him for legal advice and represent yourself in Court (as Heather Mills did in her prominent case). This option in effect gives you a legal secretary who can type your letters and documents for you in the appropriate form; you can also spend the odd hour with a solicitor if your case has met a particular obstacle with which your McKenzie is unfamiliar. You may find that this helps your case more than being represented by a solicitor in Court. There is no reason why you, your McKenzie and your solicitor should not all get round the table to discuss strategy.

Receiving public funding does not preclude you from speaking for yourself in Court or writing directly to your ex, although some solicitors will protect their income by telling you it does. Doing the latter may well result in allegations of harassment, of course.

4.2.3. Changing solicitors

It is a misconception – possibly encouraged by solicitors – that if you are legally aided you must keep the same solicitor throughout. This is also not true; the solicitor is paid by funding which comes through you. If he or she is not working in your best interests, sack him and find another solicitor. Changing a solicitor is covered by **Part 26** of the Family Procedure Rules 2010. You will need to obtain **Form N434** from the Court, complete it and return it. The funding will be transferred to your new solicitor. If you follow our advice you will ditch your solicitor, act as a Litigant-in-Person, and find yourself a McKenzie Friend.

If you change your solicitor or sack him and represent yourself you must serve notice of the change on the Court and on all respondent parties; you must also provide to the Court and all parties an address to which papers may be served (Rule 26.2(2)). Until then your original

solicitor will be presumed still to be acting for you. You must also inform other parties and the Court if your solicitor changes his address or if your Legal Aid certificate is revoked.

The form giving notice of any change, **Form FP8**, must be filed in the Court office in which the application is proceeding.

4.2.4. Querying the bill

If you persist in using a solicitor you will soon find yourself presented with a very large bill. Always demand a complete breakdown, with time logs and every expense itemised; if you are on public funding your solicitor will have to do this anyway to get their funding from the Legal Services Commission. Always keep a close check on what you are spending to ensure you are still able to pay.

If you believe the bill is too high there is a strict time limit of one month within which you must query it; refer to the Legal Complaints Service. They will check the bill and their service is free, but applies only to bills which do not include court proceedings, in that case you will have to apply to the Court to have the bill checked, and they will charge.

If you refuse to pay the bill your solicitor cannot begin proceedings against you until he has informed you about this service or about having the bill checked by the Court. It is better to pay the bill *before* having it checked for possible remuneration or your solicitor will be able to charge you interest, at a rate of 8%. You must pay some of the bill; at the very least your solicitor is entitled to demand half his fees, all of the VAT, and all the cost of any sums he has paid out on your behalf.

If you are unwilling to pay your bill because of poor service that is another matter; most disputes are resolved through conciliation. Failure to win your case is unfortunately not sufficient grounds to withhold payment, provided your solicitor has conducted himself as he is obliged to. The more fool you for trusting him – unless of course you are making a complaint about the other party's solicitor. If the solicitor is believed to be guilty of misconduct there is a further process described below.

4.2.5. Making a complaint

Remember that a solicitor has been employed by you, even if payment is from public funding. If you are not happy with the service provided or the advice given, sack him and get another solicitor, or better still, represent yourself as a Litigant-in-Person.

Solicitors who are members of *Resolution* (the family lawyers' association) are given a **code of practice**:

> ***Code of Practice for Resolution members***
>
> *Membership of Resolution commits family lawyers to resolving disputes in a non-confrontational way. We believe that family law disputes should be dealt with in a constructive way designed to preserve people's dignity and to encourage agreements.*

Members of Resolution are required to:

- *Conduct matters in a constructive and non-confrontational way*
- *Avoid use of inflammatory language both written and spoken*
- *Retain professional objectivity and respect for everyone involved*
- *Take into account the long term consequences of actions and communications as well as the short term implications*
- *Encourage clients to put the best interests of the children first*
- *Emphasise to clients the importance of being open and honest in all dealings*
- *Make clients aware of the benefits of behaving in a civilised way*
- *Keep financial and children issues separate*
- *Ensure that consideration is given to balancing the benefits of any steps against the likely costs – financial or emotional*
- *Inform clients of the options e.g. counselling, family therapy, round table negotiations, mediation, collaborative law and court proceedings*
- *Abide by the Resolution Guides to Good Practice*

This Code should be read in conjunction with the Law Society's Family Law Protocol.

All solicitors are subject to the Solicitors Practice Rules

If you wish to complain about a solicitor acting in breach of this code and proceedings are on-going, you should first send a letter headed 'complaint' and address it to the complaints partner with details of your complaint and that you require a response by return. Keep the letter short and explain that your solicitor has failed to follow instructions, answer communications or provide an adequate service.

The letter should be dealt with within 14 days. If your solicitor is a sole practitioner then he acts as his own complaints partner.

Alternatively you can approach the Legal Ombudsman though he is unlikely to deal with your complaint until you have exhausted the complaints process with your solicitor. Typical reasons to complain are,

- Failure to follow your instructions;
- Causing unreasonable delay;

- Giving inaccurate or incomplete information;
- Failure to keep you informed or to reply to phone calls and letters;
- Failure to give you accurate details of costs.

You can write to the Legal Ombudsman, email or telephone:

- Postal address: PO Box 15870, Birmingham, B30 9EB
- Email address: **enquiries@legalombudsman.org.uk**
- Telephone: 0300 555 0333

The **Legal Ombudsman website** contains a **complaint form** you can either post or email to them, or they recommend you phone them in the first instance.

You must first have made an official complaint to the lawyer or their firm before contacting the Ombudsman and they will want to see any correspondence.

They will not investigate complaints about misconduct which will be forwarded to the Solicitors Regulation Authority; you can also contact them directly. They do not cover barristers, or practices based in Scotland. Most complaints are dealt with within six months.

You can call their helpline: 0870 606 2555

Or email them: **report@sra.org.uk**

Or write to them at: Solicitors Regulation Authority
Ipsley Court
Berrington Close
Redditch
B98 8TD

You can read more about how they process a complaint on their **website**. They also have a **complaint form** which you can complete and return to them.

The Solicitors' Code of Conduct 2007, which supersedes the Solicitors' Practice Rules, is available from the Solicitors' Regulation Authority.

If you have a complaint about a member of Resolution and if all proceedings, including those relating to costs, are completely at an end and you do not intend to sue your solicitor for negligence, then you can write to:

The Legal Director
Resolution
PO Box 2108
Warwick
CV35 8YN

giving full details of your complaint and enclosing copies of any documents you would like them to consider.

The Legal Director will acknowledge your complaint and will send a copy of it to the solicitor concerned within seven days of receipt.

The Legal Director will then contact the solicitor to discuss the complaint and to ask if they can offer you an explanation and/or apology in relation to the matter about which you have complained. If you are complaining about a solicitor who acted for another person involved in the dispute, then the solicitor's response may be limited by client confidentiality, i.e. the solicitor's professional duty to the person for whom they acted that they will not disclose confidential information.

The Legal Director will then refer back to you with any explanation and/or apology. They are obliged to refer back to you within 28 days of receipt of the complaint. You should then notify the Legal Director within 28 days whether you accept the resolution offered. If you accept the resolution offered, the solicitor will be notified and no further action will be taken.

If you do decide to take further action it is a very long process which can take more than 7 months (and is calculated to make you give up). At the end of it the solicitor will merely have been inconvenienced since Resolution is little more than a club, and a solicitor who is not a member can still practice. It is his own colleagues who must decide the case, so there is nothing independent about the process.

What solicitors generally do not tell you is that you are able to bring your own complaint in the Solicitors' Disciplinary Tribunal (which is like a court and tries cases like a court) for professional misconduct. The Law Society's own handbook for solicitors '*The Guide to the Professional Conduct of Solicitors*' which has now been superseded by the *Solicitors' Code of Conduct 2007* says at paragraph 31.02 of the 1999 edition,

> *Except in those instances under the Act* [Solicitors Act 1974] *where applications are limited to the Society alone, it is open to anyone to make an application to the Tribunal without recourse to the Society.*

Breach of codes of conduct is unlikely to result in any particularly severe consequences for the solicitor – just reflect a moment on what these people do day in, day out. Furthermore, the codes are considered to be 'aspirational' and not mandatory, meaning that solicitors need only try to live up to them.

Complaints about barristers are made to the Bar Standards Board; complaints about Legal Executives are made to ILEX Professional Standards (IPS).

4.3. Legal Aid

4.3.1. Qualifying for legal aid

In November 2010 the Justice Secretary Kenneth Clarke announced that legal aid funding would be cut from family law cases as part of the Government's plan to reduce the Ministry of Justice budget by 23%. This could affect more than 200,000 cases a year. Funding would be limited to 'cases which are judged to have sufficient priority to justify the use of public funds'. That means mediated cases and those in which allegations of domestic violence or child abuse have

been made. Even where lawyers' and experts' fees continued to be paid they would be reduced by 10%.

In a U-turn in July 2011 the Government extended the definition of domestic violence to include 'psychological domestic violence'. At the time of writing the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill is at committee stage, with a report due to the House by 13th October 2011. Once this becomes law much of the information in this section will become obsolete.

The Family Law Bar Association, no doubt worried about its members' incomes, gave a warning with which Fathers 4 Justice would, for different reasons, entirely agree,[226]

> *Under the Green Paper proposals, there will be an 'inequality of arms' in cases involving domestic violence before the courts – where the alleged victim will be entitled to public funds, whereas the alleged perpetrator will not be so entitled. There is a real risk of a surge in the number of allegations, and possibly cross-allegations, of domestic violence in order to be able to qualify for public funds.*
>
> *Equally worrying is in private law children cases, if a Judge considers that serious child protection issues arise such that the threshold for a care or supervision order with respect to the child may be satisfied, the Court may direct the appropriate authority to undertake an investigation of the child's circumstances under section 37 of the Children Act 1989. Whilst this investigation takes place, an interim care order can be made. In effect, this means that parents could have their children removed, and because they would not be entitled to legal aid, they would go unrepresented.*

In 2000 Legal Aid was replaced by Community Legal Service Funding, also known as Public Funding, but is still generally referred to as Legal Aid. It is provided by the taxpayer and administered by the **Legal Services Commission** (LSC) so litigants on low incomes or none can afford to pay the astronomic costs of hiring a solicitor or barrister, Children's Guardian and other court expenses. Your solicitor will provide you with all the information you need, and the appropriate forms so that the LSC can determine whether or not you qualify; you can also use the **calculator** on their website. Solicitors must be members of Resolution (formerly the SFLA) and uphold the Resolution guidelines to qualify for public funding.

The Legal Services Commission operates according to a **Funding Code** which has three parts: Criteria, Procedures and Decision Making Guidance. All documents are available on their website.

Public funding cases do not pay lawyers as generously as private cases (and payments are due to drop 10%),[227] which means that commonly solicitors who are willing to do public funding work are not good or experienced enough to earn 'real' lawyers' fees in private law. Sometimes you can be lucky and find a solicitor or barrister who does legal aid work out of charity and conviction, but they are rare.

[226] Stephen Cobb QC, Family Law Bar Association warns of consequences of civil legal aid cuts, Family Law Week, 16 December 2010, http://www.familylawweek.co.uk/site.aspx?i=ed74300

[227] According to the Law Society legal aid lawyers earned an average of £25,000 in 2009.

Do not fall into the trap of believing that legal aid is a free service; legal aid is paid according to income, and unless your income is very low you will have to pay monthly contributions. If you get legal aid for a divorce, you will have to pay it back out of the divorce settlement before you get anything. It is entirely possible to run up a legal aid bill of £20,000 in a year. Alternatively, if you sell your home, your debt will be taken out of that.

You will not get legal aid if you (and your current partner) have disposable capital of more than £8,000. If you have more than £1,000 you will have to pay the Commission a minimum of £100. If you're getting Income Support, Income-based Jobseeker's Allowance or the guarantee credit part of Pension Credit, you'll automatically get Legal Help regardless of the value of your home or of any other capital you have. If you are late with any of your contributions your legal aid may well be stopped.

Legal aid is supplied on 'advice' from your solicitor and is dependent on the likelihood of success, that is, its legal 'merit'. The criterion you must satisfy in order to qualify for legal aid in private law cases is that it will enable you to obtain what you would regard as a significant improvement in the arrangements for your children. In public law it is that you obtain the order sought, or win the appeal.

In private law this means that legal aid can be obstructed by the other side claiming that a case has 'no merit'. The rules under which legal aid is approved are not rigid and there is room for discretion by the Commissioners. They appear to operate under the common preconception that the best interests of the child coincide with those of the resident parent. For a residence application a non-resident parent will therefore need to show evidence that the other is unfit. In turn, the resident parent must demonstrate concerns about the NRP and a probability that contact with him is not in the child's interest.

If you are unable to get legal aid yourself it may be appropriate to have your child joined as a party to the case. Contact the Law Society who will be able to recommend a solicitor who will act for your child. Children are awarded legal aid where adults are not. Obviously you must be aware that your child's solicitor will act for your child and not for you. Cite **Mabon v Mabon [2005] EWCA Civ 634**, [2005] 2 FLR 1011 in which Thorpe LJ ruled that three mature and articulate teenagers had a right to separate representation and to instruct their own solicitor.

If the other party has a legal aid '**certificate**' their solicitor is obliged to inform you. If you are not sure contact the Legal Services Commission to confirm; they are obliged to reply to you and provide a copy of the 'certificate' which will detail what it covers and what the upper limit is.

On a divorce a wife is usually granted legal aid and the husband usually is not. Many men will run out of money and end up representing themselves. The result is that the State effectively backs one party in the divorce (the wife) putting the other party (the husband) at a considerable disadvantage. Given the general pro-mother bias in family law the result is that the man ends up worse off.

4.3.2. The levels of legal aid

The Legal Services Commission provides funding for family issues at **four levels**; note that these distinctions will be known to your solicitor and you shouldn't need to worry about them:

- **Legal Help** – this covers the initial meeting with a solicitor and follow-up advice, including referral to other services such as mediation. Legal Help can be used for initial consultation on public law matters and for issues such as a change of name. It also covers domestic violence cases.

- **Family Help (Lower)** – covers more substantial advice, assistance and negotiation. It will cover orders agreed through consent. There must be a significant dispute which will benefit from litigation. In public law it is used to fund care proceedings.

- **Family Help (Higher)** – covers proceedings where a consent order is not possible, with a view to securing early resolution. It kicks in once it is apparent that negotiation isn't going to work. The solicitor must make a separate application once matters reach this stage and this will introduce delay. Family Help (Higher) can only be used in private law proceedings.

- **Legal Representation** – this covers preparation and representation in all other contested family proceedings including final hearings. If you are reading this guidance this is the level of funding you are most likely going to need.

If your application for legal aid is accepted the other party will be informed, so that they may well contact the LSC in order to stop your funding, by making false allegations about your finances, or the uses to which you are putting the funding (to pursue a different case, for example).

An alternative to legal aid is General Family Help, which is also administered through the LSC. This can cover the cost of starting a legal action, and is especially aimed at early resolution through negotiation. If you are in mediation, you can get funding called Help with Mediation, to enable you to pay the solicitor or advisor. They will give you the appropriate information and forms.

Reform of legal aid is clearly overdue: it was costing the taxpayer more than £2 billion a year, and in 2008/9 private law certificates increased by 16%,[228] but the Government's approach has been financially driven and is likely to put many legal aid practitioners out of work (not necessarily a bad thing) and to put justice beyond the reach of many poorer people. It will greatly increase the likelihood that your ex will make false allegations against you.

There is anecdotal evidence that more litigants are already representing themselves;[229] a disproportionate number may be women, as they make up 61% of legal aided litigants.[230] This is just one of the factors which make this present volume necessary.

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[228] Ministry of Justice, *Family Legal Aid Funding from 2010: a consultation response*, October 2009, https://consult.legalservices.gov.uk/inovem/gf2.ti/f/137410/3070821.1/pdf/-/Consresponse21.10.09.pdf

[229] Ibid.

[230] Based on 2008/09 certificates. This rises to 72% in Finance cases and 80% in domestic violence cases.

Even before the coalition's proposal to substantially cut legal aid the Legal Services Commission was intending to reallocate the contracts awarded to solicitors. One concern raised, and acknowledged by the Government,[231] was that lawyers would 'cherry-pick' cases and avoid more complex or demanding ones. As a result some cases, such as **Children's Guardian cases**, were removed from the scheme. There was also a concern that the 'quality' of work would suffer, but since there is no measure of quality this cannot be assessed.

In July 2010 the President of the Family Division, Lord Justice Wall, sent a letter to the Legal Services Commission[232] expressing his concern that the reallocation of legal aid contracts due in October would lead to the loss of competent and experienced lawyers, while inexperienced firms would take over much of their work, leading to huge delays and an increase in litigants in person,

> *if we end up with an unworkable system, or a system operated by those who are inexperienced and/or do not know fully what they are doing, everyone will lose out. The principal losers, of course, will be those whom the system is most designed to protect, namely vulnerable families and children. Cases will take longer, there will be many more litigants in person, and there is a grave danger that the system will simply implode.*

The previous week two lawyers representing the Association of Lawyers for children, Piers Pressdee and Alan Bean conveyed similar fears in a letter to the Times,[233]

> *Inexcusably, many of the most experienced children lawyers in the country are set to be excluded from the system just when the need for them is greatest. Unless the Government steps in, from October the family justice system, already creaking from years of under-investment, will officially be in complete meltdown.*

At the end of August the Law Society announced it was taking the Legal Services Commission to Court seeking a declaration that the family tender process – which would reduce the number of firms providing family work from 2,400 to 1,300 – was 'unlawful' and asking for a suspension of the new contracts. A month later the High Court declared the tender process unlawful and likely seriously to reduce access to justice for children and their families. The LSC was forced to extend the existing contracts until 30th November 2011.

4.3.3. If legal aid is stopped

One of the problems with legal aid is that it can suddenly and arbitrarily be stopped, often when you are just about to go for a four day hearing or some other expensive proceeding. Usually this will be because your children's other parent has managed to throw a spanner into the works and the Legal Services Commission must investigate.

[231] Ministry of Justice, *Final Impact Assessment of Family Legal Aid Funding from* 2010, October 2009, https://consult.legalservices.gov.uk/inovem/gf2.ti/f/137410/3070853.1/pdf/-/Annex_A_IA_21.10.09.pdf

[232] Full text here: http://standpointmag.co.uk/node/3274

[233] Full text here: http://www.familylawweek.co.uk/site.aspx?i=ed63487

If your legal aid is stopped your solicitor will stop acting for you until it is restored, beyond writing a letter or two. Your ex will exploit this situation. This is another reason why you are much better advised not to waste time and money on a solicitor. The LSC must give you a review which you can appeal. This can take eight weeks. In a civil case you can plead that you are having problems obtaining legal aid and ask for the hearings to be adjourned. In the interim you can ask for an Undertaking, for example, that the children will not be removed from the UK until your legal aid certificate is reinstated. That is your emergency measure. The courts will not refuse as they want you to continue spinning around in their circus. This does not mean that your children's other parent will not take advantage of the delay to abduct your children – it may well be why he or she planned to stop your funding in the first place.

It is quite likely that the other parent will try to stop you from receiving legal aid; there are various grounds on which you can try to stop theirs:

- He or she has refused mediation. The Legal Services Commission should not grant legal aid until mediation has been attempted. If you have a solicitor's letter stating that they refuse mediation, so much the better;

- Claim that the application (if the other parent is the applicant) is 'without merit', and therefore should not benefit from public money;

- Challenge their public funding on financial grounds – they are earning more than the limit; their house is worth more than the limit; etc.;

- If you think that they are abusing the system and wasting public money ask the Court not to sign the legal aid certificate – not terribly likely to succeed but worth a try.

Taking away the free solicitor will force your ex to do their own dirty work and will level the playing field; one thing on your side is that there is far more independent support and advice available to parents trying to restore and maintain contact than there is for parents who want to end it. Bear in mind that if you do manage to stop the legal aid certificate it is likely that a new one will be issued immediately.

4.4. Representing Yourself

4.4.1. Litigants in person

A Litigant-in-Person (LIP) is a party to a case who appears at a hearing without representation by a solicitor or barrister. This may be because they can no longer afford such representation, because they have been refused Legal Aid, or because they believe that such representation will not be in their best interests.

Because the practice loses them money, and few professionals welcome amateurs, solicitors are dismissive of LIPs, and refer to them privately as 'Lunatics in Person'. Generally the legal profession – including the judiciary – don't like them, although Mr Justice Munby said in a submission to the Commons Constitutional Affairs Committee that he found it easier to settle cases when solicitors were not involved and the litigants appeared in person, 'What you are getting is the facts as they see it without the assistance – and some people might put the word in inverted commas – of lawyers'.

We believe that representing yourself is by far your best option; you will save a small fortune and be in control of your case. The Court will not expect you to be as familiar with the law as a legal professional, but will expect you to put your case clearly. You must be able to be objective about your case – not always easy in such an emotional area – and to understand the legislation and case law. With the right support from this e-Book, from internet fora and from McKenzie Friends you will be surprised by what you can achieve, and at the same time you will help to undermine the system.

If you decide to go the LIP route you may need to communicate directly with your children's other parent. If you have to visit them – for example to serve documents – take a witness, preferably a friend of the same sex as yourself; if you phone, record the conversation and then confirm the conversation in a letter. If you do not take these precautions you will open yourself up to accusations of harassment or domestic violence. Log every visit and conversation in your **chronology**.

4.4.2. What will it cost?

In July 2010 the Legal Services Commission reported that the average cost of a publicly funded private law case was £3,285[234] (although the Ministry of Justice has quoted a figure of £2,823 – in 2007 it had been £1,746[235]). If they are receiving public funding, however, what solicitors can charge is restricted; if you are paying your own way no such restrictions apply and the chances are that you exceeded that cost a long time ago, and your case doesn't show any signs of imminent resolution. If you are using a solicitor, at a rate of over £200 per hour, you could well run up costs in the order of tens of thousands of pounds. Many cases end only when one party runs out of money.

If you represent yourself you will save a great deal, but it still won't be cheap. The cost of a basic application is £200.[236] Further applications will cost between £40 and £400 depending on what you are applying for. These **costs** have been rising rapidly and are set to rise further in the future. As far as you can, try to apply for as much as possible on one application, and try to make any further requests to the Court on your existing application.

You need to factor in the cost of getting to Court, and if your case is transferred to the Principal Registry or the Royal Courts of Justice

[234] Legal Services Commission Statistical Information, July 2010, http://www.legalservices.gov.uk/docs/stat_and_guidance/Stats_Pack_0910_23Jul10.pdf
[235] The National Audit Office, *Legal aid and mediation for people involved in family breakdown*, 2 March 2007, http://www.nao.org.uk/publications/nao_reports/06-07/0607256.pdf
[236] Civil and Family Court Fees, High Court and County Court – From July 2009, http://www.hmcourts-service.gov.uk/courtfinder/forms/ex50_web_0610.pdf

you will need to travel to London on a regular basis. If you are called for a three or four day final hearing see if you can find a friend who will put you up.

If you are using McKenzie Friends, and we strongly recommend that you do, you must pay their expenses. Some McKenzies charge an hourly rate; we're not entirely happy with the idea of making money out of others' misery, but you will probably want to compensate them in some way for taking a day off work for you.

It all mounts up, and if you are on a low wage or out of work you may be tempted to go the legal aid route. We don't recommend you do that. Legal aid is limited and it won't cover everything, and a solicitor really won't help you as much as you think. We appreciate you may have lost your job, and your ex has got your house (quite likely if you're a father) and has cleared out your bank accounts. But this is your children we are talking about. You'll only get one stab at this. Now is the time to call in favours, grovel to your parents and your family; beg from your friends. Good luck. You're going to need it.

4.4.3. Claiming costs

Generally parties in children cases pay their own costs and costs orders are rare unless a party behaves unreasonably or incurs unnecessary costs. If you are representing yourself and your ex has a solicitor, every application you make or letter you write will cause your ex additional costs. This can be used as a tactic to wear down unreasonable opposition to contact, but it can also backfire if the Court thinks you are being vexatious.

As an LIP you can still claim costs, and from 1st October 2011 the LIP rate will increase from £9.25 per hour (the rate set in 1995) to £18.00.

It remains the case that if a costs order is made against an LIP he can expect to pay costs at rates in excess of £150 per hour. If he wins then unless he can prove pecuniary loss (i.e. he took time off work without pay to conduct his case) all he can recover is the paltry £18.00 per hour, for doing exactly the same work as solicitor and counsel. This is a gross violation of the 'equality of arms' principle.[237] In the family law context it is also indirectly discriminatory since many more men act in person than women.

Under Section 11(4)(d) of the Access to Justice Act 1999 the power to claim costs against a funded litigant is now governed by the Community Legal Service (Costs) Regulations 2000 (SI 2000/441 as amended by the 'Costs Regulations') and the Community Legal Service (Cost Protection) Regulations 2000 (SI 2000/824 as amended by the 'Cost Protection Regulations'). Under these regulations the function of deciding whether or not a costs order should be made against the Legal Services Commission (LSC) is now assigned to the Costs Judge or District Judge.

- Regulations 9, 10 and 10a of the Costs Regulations determine the procedure for claiming costs;

- Regulation 5 of the Costs Protection Regulations determines the circumstances under which a claim can be made;

[237] I.e. 'a reasonable opportunity of presenting the case to the Court under conditions which do not place him in substantial disadvantages vis-à-vis his opponent' (Kaufman *v.* Belgium, 1986).

- The Costs Practice Directions determine the procedure for claiming costs.

The appropriate procedure was set out in R v Secretary of State for the Home Department *Ex Parte* Gunn [2001] 3 All ER 481:

Stage 1

In the first stage the Court, referred to as the Trial Court, deals with the substance of the dispute; these hearings are held in closed court. The role of the Trial Court is as follows:

i. To decide whether to make an order for costs against a funded litigant (Costs Regulation 9(1));

ii. To decide whether it is in a position to specify the amount, if any, to be paid by the funded litigant (Costs Regulation 9(2));

iii. To make a costs order against the client which either

a) Specifies the amount, if any, to be paid by the funded litigant and states the amount of the full costs, or

b) Does not specify the amount to be paid (Costs Regulation 9(3) and (4)).

The order is described in the Regulations as a Section 11(1) costs order and is defined in both sets of regulations as a 'costs order against a client (the funded litigant) where cost protection applies'. 'Cost protection' means 'the limit set on costs awarded against a client set out in Section 11(1) of the Act'.

iv. Where the order does not specify the amount to be paid by the funded litigant, to make, if it sees fit, findings of fact, as to the parties' conduct in the proceedings or otherwise, relevant to the determination of that amount (Regulations 9(6)).

Stage 2

Stage 2 consists of the procedure to be followed to ascertain the amount of costs to be paid when the order made by the Trial Court does not specify the amount. Stage 2 also includes the procedure for determining whether an order for costs should be made against the LSC (Costs Regulation 9(5)).

i. If a costs order has been made in your favour you may, within three months of the making of the costs order (unless you can show good reasons for delaying the application longer), make an application to the Court on Form N244 for a hearing to determine the costs payable to you (Costs Regulation 10(2)).

ii. You may, at the same time, seek a costs order against the LSC (Regulation 10(3)(c)).

iii. You must, when making the request, file with the Court and serve on the funded litigant and the Regional Director of the LSC:

a) A bill of costs;

b) A statement of resources (unless the Court is determining an application for a costs order against the Commission and the costs were not incurred in a court of first instance);

c) A written notice that a costs order is sought against the LSC (Regulation 10(3), [3A] and (4)).

iv. The funded litigant must file a statement of resources and serve this on you and the Regional Director (where a claim is made on the LSC) (Regulation 10(6)).

v. The Court sets a date for the hearing (Regulation 19(9)).

vi. The Court conducts the hearing, assesses the costs (if any) to be paid by the funded litigant and, where appropriate, makes a costs order against the LSC.

Any determination made under Regulation 9 or 10 of the Costs Regulations is final (Regulation 11(1)). Any party with a financial interest in the assessment of the full costs other than a funded party, may appeal against that assessment in accordance with the Civil Proceedings Rules Part 52 (Regulation 11(2) and CPR 47.20). You may appeal either on a point of law, against the making of a costs order against the LSC, against the amount of costs the LSC is required to pay or against the Court's refusal to make such an order (Regulation 11(4)). You may also in certain circumstances re-apply to the Court for an increase in the sum payable on proof of a significant change in the other party's circumstances. Such applications cannot be made more than six years after the date of the first order under Section 11 (Regulation 12).

The usual rule in family cases is that there should be no order for costs where both parties reasonably present their case to the Court. Costs orders are rare; only if you 'go beyond the bounds of what is appropriate'[238] or the other party is likely to suffer financial hardship should the Court order costs against you. Claiming costs can be counter-productive as it can appear vindictive and provocative; in many cases you will be better advised to leave things as they are – why stir up another hornets' nest?

Other than in exceptional cases each side bears its own costs. If the Court order allows costs against you it will say so on the order. Most orders will say 'No order as to costs, etc.'. In that case the other party – or their legal team – will not be able to claim costs against you, although the solicitors may well try it on.

If you do want to claim costs use as a precedent a case called *Ex parte* Wulfsohn. A Litigant-in-Person had been awarded £120 by the parsimonious judge in the Queen's Bench Division; on appeal the Court of Appeal awarded him £10,000.

If all costs are awarded against you use as your precedent **Re F (A Child) [2008] EWCA Civ 938** in which the father made allegations in good faith against the mother's boyfriend which later proved to be unfounded and the mother made false counter allegations; the judge awarded all costs (£120,000) against the father, ignoring the mother's

[238] Re F (A Child) [2008] EWCA Civ 938, http://www.familylawweek.co.uk/site.aspx?i=ed25322

bad behaviour entirely. The father appealed and the Appeal Court reduced his costs to £50,000.

4.5. McKenzie Friends

4.5.1. The McKenzie's role

When you attend Court as an LIP you may bring with you if you wish a lay advisor to support and assist you known as a McKenzie Friend (sometimes also referred to as a 'litigation friend'). This will be someone who is probably not a professional solicitor or barrister, but who nevertheless has some knowledge of family law and court proceedings. McKenzie Friends are commonly associated with fathers acting as litigants in person but they will also act for mothers if the case merits it. You can take anyone you like to Court with you (with some exceptions we shall look at), but you are advised to find someone who has acted as a McKenzie before and has a successful track record.

The name derives from the divorce litigation in 1970 between Mr and Mrs McKenzie, and in particular to Mr McKenzie's appeal to the Court of Appeal (McKenzie v McKenzie [1970] 3 WLR 472 CA). The original McKenzie friend was Ian Hanger, a recently-qualified Australian barrister then working a gap year in London, and subsequently a highly respected QC.

One may cite in support of the practice the statement of Lord Tenterden CJ in Collier v Hicks [1831] 2 B & Ad 663 that,

> *Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice.*

Guidance on McKenzie Friends was updated by the former President of the Family Division, Sir Mark Potter, in October 2008 following a case brought by a family rights campaigner and cited below at **4.5.4** as Re N. After years of judicial prejudice it consolidated the position of McKenzies as part of the court process. This guidance was more recently updated in July 2010 by the current President, Lord Justice Wall, in *President's Guidance: McKenzie Friends* following implementation of the Legal Services Act 2007. It actually represents a step backwards and in private hearings litigants must justify the use of a McKenzie.

In view of the opposition to McKenzies in the past, it is pertinent to quote the guidance at length:

> 1. *This Guidance applies to civil and family proceedings in the Court of Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Courts. It is issued as guidance (not as a Practice Direction) by the Master of the Rolls, as Head of Civil Justice, and the President of the Family Division, as Head of Family Justice. It is intended to remind courts and litigants of the principles set out in the authorities and supersedes the guidance contained in Practice Note*

(Family Courts: McKenzie Friends) (No 2) [2008] 1 WLR 2757, which is now withdrawn. It is issued in light of the increase in litigants-in-person (litigants) in all levels of the civil and family courts.

The Right to Reasonable Assistance

2. Litigants have the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend (MF). Litigants assisted by MFs remain litigants-in-person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation.

What McKenzie Friends may do

3. MFs may:

(i) provide moral support for litigants;

(ii) take notes;

(This is a vital function for you which doesn't require an experienced McKenzie, just someone who can take rapid but accurate notes on everything that is said in Court. Your McKenzie should note the start and end times of each session in the proceedings, and during the hearing periodically note the time in the margin of your notes for easy reference later.)

(iii) help with case papers;

(iv) quietly give advice on any aspect of the conduct of the case.

(This includes points of law, issues the litigant may need to raise in Court and questions the litigant may need to put to a witness.)

What McKenzie Friends may not do

4. MFs may not:

(i) act as the litigants' agent in relation to the proceedings;

(An LIP must still represent himself.)

(ii) manage litigants' cases outside court, for example by signing court documents; or

(iii) address the court, make oral submissions or examine witnesses.

(Unless authorised by the Court. A McKenzie who does so becomes an advocate and requires the grant of a 'right of audience'. We shall look at the procedure and circumstances in which a court may allow this at **4.5.4**).

Exercising the Right to Reasonable Assistance

5. While litigants ordinarily have a right to receive reasonable assistance from MFs the Court retains the power to refuse to permit such assistance. The court may

do so where it is satisfied that, in that case, the interests of justice and fairness do not require the litigant to receive such assistance.

6. *A litigant who wishes to exercise this right should inform the judge as soon as possible indicating who the MF will be. The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience, confirming that he or she has no interest in the case and understands the MF's role and the duty of confidentiality.*

(This rule makes it necessary for the McKenzie to have sufficient experience to put into a CV. A new McKenzie without experience is hampered by this and may be rejected on this ground.)

7. *If the court considers that there might be grounds for circumscribing the right to receive such assistance, or a party objects to the presence of, or assistance given by a MF, it is not for the litigant to justify the exercise of the right. It is for the Court or the objecting party to provide sufficient reasons why the litigant should not receive such assistance.*

8. *When considering whether to circumscribe the right to assistance or refuse a MF permission to attend the right to a fair trial is engaged. The matter should be considered carefully. The litigant should be given a reasonable opportunity to argue the point. The proposed MF should not be excluded from that hearing and should normally be allowed to help the litigant.*

9. *Where proceedings are in closed court, i.e. the hearing is in chambers, is in private, or the proceedings relate to a child, the litigant is required to justify the MF's presence in court. The presumption in favour of permitting a MF to attend such hearings, and thereby enable litigants to exercise the right to assistance, is a strong one.*

(But not as strong as it was – once again litigants are being refused leave to have the assistance of a McKenzie Friend.)

10. *The court may refuse to allow a litigant to exercise the right to receive assistance at the start of a hearing. The court can also circumscribe the right during the course of a hearing. It may be refused at the start of a hearing or later circumscribed where the Court forms the view that a MF may give, has given, or is giving, assistance which impedes the efficient administration of justice. However, the Court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance.*

(The definition of 'the court' in most guidance usually refers to the judge sitting in court; in this context, however, it appears to refer to the court administrative staff, and a McKenzie may be rejected by the court clerk – and forcibly removed by security – before getting anywhere near the courtroom.)

11. *A decision by the court not to curtail assistance from a MF should be regarded as final, save on the ground of subsequent misconduct by the MF or on the ground that*

the MF's continuing presence will impede the efficient administration of justice. In such event the court should give a short judgment setting out the reasons why it has curtailed the right to assistance. Litigants may appeal such decisions. MFs have no standing to do so.

12. *The following factors should not be taken to justify the Court refusing to permit a litigant receiving such assistance:*

    (i) The case or application is simple or straightforward, or is, for instance, a directions or case management hearing;

    (ii) The litigant appears capable of conducting the case without assistance;

    (iii) The litigant is unrepresented through choice;

    (iv) The other party is not represented;

    (v) The proposed MF belongs to an organisation that promotes a particular cause;

    (vi) The proceedings are confidential and the Court papers contain sensitive information relating to a family's affairs

13. *A litigant may be denied the assistance of a MF because its provision might undermine or has undermined the efficient administration of justice. Examples of circumstances where this might arise are: i) the assistance is being provided for an improper purpose; ii) the assistance is unreasonable in nature or degree; iii) the MF is subject to a civil proceedings order or a civil restraint order; iv) the MF is using the litigant as a puppet; v) the MF is directly or indirectly conducting the litigation; vi) the Court is not satisfied that the MF fully understands the duty of confidentiality.*

(Note particularly reason (iv): the judiciary are clearly under the impression that a McKenzie Friend may be using the litigant in order to further a campaign.)

14. *Where a litigant is receiving assistance from a MF in care proceedings, the Court should consider the MF's attendance at any advocates' meetings directed by the court, and, with regard to cases commenced after 1.4.08, consider directions in accordance with paragraph 13.2 of the Practice Direction Guide to Case Management in Public Law Proceedings.*

15. *Litigants are permitted to communicate any information, including filed evidence, relating to the proceedings to MFs for the purpose of obtaining advice or assistance in relation to the proceedings.*

16. *Legal representatives should ensure that documents are served on litigants in good time to enable them to seek*

assistance regarding their content from MFs in advance of any hearing or advocates' meeting.

17. *The High Court can, under its inherent jurisdiction, impose a civil restraint order on MFs who repeatedly act in ways that undermine the efficient administration of justice.*

Rights of audience and rights to conduct litigation

18. *MFs do not have a right of audience or a right to conduct litigation. It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or, in the case of an otherwise unqualified or unauthorised individual (i.e., a lay individual including a MF), the Court grants such rights on a case-by-case basis.*[239]

19. *Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.*

20. *Any application for a right of audience or a right to conduct litigation to be granted to any lay person should therefore be considered very carefully. The court should only be prepared to grant such rights where there is good reason to do so taking into account all the circumstances of the case, which are likely to vary greatly. Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.*

21. *Examples of the type of special circumstances which have been held to justify the grant of a right of audience to a lay person, including a MF, are:*

(i) that person is a close relative of the litigant;

(ii) health problems preclude the litigant from addressing the court, or conducting litigation, and the litigant cannot afford to pay for a qualified legal representative;

(iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings.

22. *It is for the litigant to persuade the Court that the circumstances of the case are such that it is in the interests of justice for the Court to grant a lay person a right of audience or a right to conduct litigation.*

[239] Legal Services Act 2007 s12 – 19 and Schedule 3.

23. *The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional MFs or who seek to exercise such rights on a regular basis, whether for reward or not, will however only be granted in exceptional circumstances. To do otherwise would tend to subvert the will of Parliament.*

24. *If a litigant wants a lay person to be granted a right of audience, an application must be made at the start of the hearing. If a right to conduct litigation is sought such an application must be made at the earliest possible time and must be made, in any event, before the lay person does anything which amounts to the conduct of litigation. It is for litigants to persuade the court, on a case-by-case basis, that the grant of such rights is justified.*

25. *Rights of audience and the right to conduct litigation are separate rights. The grant of one right to a lay person does not mean that a grant of the other right has been made. If both rights are sought their grant must be applied for individually and justified separately.*

26. *Having granted either a right of audience or a right to conduct litigation, the Court has the power to remove either right. The grant of such rights in one set of proceedings cannot be relied on as a precedent supporting their grant in future proceedings.*

Remuneration

27. *Litigants can enter into lawful agreements to pay fees to MFs for the provision of reasonable assistance in court or out of court by, for instance, carrying out clerical or mechanical activities, such as photocopying documents, preparing bundles, delivering documents to opposing parties or the court, or the provision of legal advice in connection with court proceedings. Such fees cannot be lawfully recovered from the opposing party.*

28. *Fees said to be incurred by MFs for carrying out the conduct of litigation, where the Court has not granted such a right, cannot lawfully be recovered from either the litigant for whom they carry out such work or the opposing party.*

29. *Fees said to be incurred by MFs for carrying out the conduct of litigation after the Court has granted such a right are in principle recoverable from the litigant for whom the work is carried out. Such fees cannot be lawfully recovered from the opposing party.*

30. *Fees said to be incurred by MFs for exercising a right of audience following the grant of such a right by the Court are in principle recoverable from the litigant on whose behalf the right is exercised. Such fees are also recoverable, in principle, from the opposing party as a recoverable disbursement: CPR 48.6(2) and 48(6)(3)(ii).*

Note: the following:

- The judge may restrict the activities of a McKenzie Friend for misconduct such as wasting court time or going beyond their proper role by, for instance, adopting a general campaigning stance as a member of a pressure group;

- The judge can also restrict or terminate the role of a McKenzie Friend if he or she is wasting the time of the Court by, for instance, introducing irrelevant issues or asking irrelevant or repetitious questions;

- Attending interviews:

    - A McKenzie Friend has no right to attend an interview. This may be permitted by CAFCASS if the consent of the other parties has been obtained and assurances given that the litigant and McKenzie Friend will not make any unauthorised disclosures of evidence. If in doubt, seek the Court's directions.

- Tape-Recording Interviews:

    - Note also there is no automatic right for parties to tape-record interviews. It may be allowed if similar assurances are given. A tape-recording of an interview in a children case is a confidential piece of evidence and the same restrictions against disclosure apply.

The case is still conducted by the Litigant-in-Person. A Litigant-in-Person has a right to have this help in a public (open court) hearing but because most children hearings are conducted in private the permission of the judge is needed in advance to allow the McKenzie Friend access.

Warning: The Family Courts deal with confidential (secret) children proceedings. There have been cases in which litigants have disclosed children case documents to, for instance, fellow members of campaigning/support groups. Any such disclosure made without the leave of the Court to someone who is not a party or a legal representative may be a Contempt of Court (see below regarding to whom you can **disclose information**). Penalties for this can include fining and imprisonment.

In July 2007 Steve Stephenson, a McKenzie from the state-funded charity Families Need Fathers (FNF) who was representing a mother, wrote to the judge making 'false and defamatory allegations' against the father.[240] He did this with the full knowledge and support of the charity's management, so that it may be assumed he was not the first to act in this way. The deception was found out, more than a year and three hearings later, only because the father checked his court file.

Behaviour like this can bring the entire practice of using McKenzies into disrepute, and endangers all fathers; it may well have contributed to the recent restrictions on the use of McKenzies. If you suspect your McKenzie is using these sort of underhand tactics, get rid of him

[240] Fiona Hamilton, *Fathers' rights official tried to ruin man's custody case*, The Times, 13 September 2008, http://www.timesonline.co.uk/tol/news/uk/article4743750.ece

now and inform the organisation with which he is connected, it will only backfire on you later.

4.5.2. Tips on using a McKenzie

Here are our tips on the use of a McKenzie Friend:

- Ensure that your McKenzie knows the law and the rules and abides by them. McKenzies do not always act correctly and this could prejudice your case; remember in particular that any correspondence to the Court must be copied to the other party. There is no agreed code of conduct yet for McKenzies, but at the very least you should establish that yours has read the most recent *President's Guidance*;

- We think a good McKenzie should:

    - Explain to you his interest in and experience of the Family Courts, both as a litigant and as a McKenzie Friend;

    - Explain his availability and the time he can give to your case;

    - Advise you against taking the option of litigation other than as a last resort. He should help you explore other options such as mediation provided that it does not introduce delay;

    - Inform you before you start how he wants to be paid – most will expect their expenses to be covered but some will charge a fee;

    - Explain all the options available to you, with their advantages and pitfalls;

    - Help you present your case and formulate your argument;

    - Focus on what is in the best interests of the child rather than of the parent he is assisting. He should never assist a parent to do something unethical or illegal;

    - Not approach the other party or communicate with them in any way – that is your job;

    - Take care to present the family justice system to you as it is and not in any idealised form; he should be honest about your chances of success;

    - Never guarantee an outcome as solicitors do – the Family Courts are always unpredictable;

    - Not use your case to further a campaign;

    - Not question every single minor technicality.

- Find out as soon as possible who the judge will be;

- Write to him or her asking leave for your chosen McKenzie to assist you (remember that a McKenzie should have no personal interest in the case and therefore should not be a relative, although see Clarkson v Gilbert below). Insist that if you are not given leave you will decline to take part in proceedings and will

instead appeal to the Court of Appeal – and attach to your letter a reasoned submission with reference to the *President's Guidance*; your letter must include

- Your case reference number;
- The fact that you intend to represent yourself aided by a McKenzie;
- Your McKenzie's name and relevant experience;
- Confirmation that your McKenzie has no personal interest in your case and understands the rules governing the use of a McKenzie;
- A copy of the Practice Direction: *President's Guidance: McKenzie Friends* we outlined above.

- If the judge orders a separate hearing on the McKenzie issue and refuses your application then apply immediately to the Court of Appeal which is likely to expedite the matter to be heard in time before the hearing;
- If the judge only deals with the issue on the day of the hearing and you are refused your McKenzie decline to take part and apply immediately to the Court of Appeal;
- If the judge says that he wants to see the parties alone insist that the Respondent's counsel is also debarred from the courtroom; otherwise insist that if counsel is there your McKenzie must also be (equality of arms);
- Read the preceding as an appeal to a Circuit Judge if the trial is before a District Judge;
- The judge will be under pressure not to be seen to be wasting valuable court time by aborting a hearing or risking a further hearing;
- Do not be afraid of standing up to judges for your fundamental rights and those of your children; if you are refused leave to have a McKenzie sitting with you or are hampered in any way, walk out and appeal.

Try to get a recommendation before committing yourself to a particular McKenzie; most fathers' groups will be able to put you in touch with a good one although some groups will insist you join and pay the membership fee before they will help. Fathers 4 Justice provide this information without strings attached.

An increasing number of McKenzie Friends are charging for their services. This does not guarantee that they are experienced or any good, and we would advise caution. Don't assume that because one charges highly he is better than one who doesn't. We've encountered some terrible advice from some very expensive McKenzies – the best probably don't charge at all.

These high charges are putting pressure on the whole principle of the McKenzie as a lay advisor; many in the judiciary are demanding that

McKenzies should be subject to a disciplinary code, that their fees should be regulated and that they should be under an obligation to provide indemnity to protect the Litigant-in-Person if they make a hash of it or are negligent. If McKenzie Friends or their parent organisations do not take this action themselves, it is possible it will be imposed on them from above, or that the use of McKenzies will be severely curtailed.

If your McKenzie charges read the section of the President's Guidance on Remuneration, and check that he is only charging for what he is entitled to charge for.

If your McKenzie doesn't charge for his services you must offer at least to cover his expenses, including travelling costs and the costs of any accommodation he may need if you cannot put him up yourself. Also offer to pay for stationery and telephone calls, etc.

Note: that most McKenzie Friends will be part of a network and may discuss your case with others either in order to get you better advice or so that a lesson learnt in your case can be used to help other parents. Sometimes they may be so upset by a case they just need to talk to someone.

The best way to find a McKenzie Friend who will assist you with your case is to contact a reputable organisation which can put you in touch with a McKenzie, and which has a good support structure and an internet forum on which you can exchange advice. Even if your McKenzie is not hugely knowledgeable about the law he or she can take notes for you and help keep you calm. **Never go to Court on your own**.

It is up to you to learn your rights and the relevant law; even a solicitor will not do everything for you, especially where research into recent case law is concerned. Read as much as you can about your own situation and keep up-to-date with recent precedents and developments; the best way to do this is through an internet forum. The information you need is available, but you will need the help of the people on a forum to guide you in the right direction. Remember: your children are no one's responsibility but your own.

Learn about how solicitors and barristers work and get to know how they think. They will try to take control of the case and stay in control, so throw them as many fast balls as you can; they will certainly try to exploit your relative inexperience. Use that to your advantage: go to Court fully prepared, but act dumb; the Court will not expect you to know all the correct procedures and will cut you far more slack than the lawyers acting for your represented ex. Exploit this, for example, by filing statements late or introducing surprise witnesses, but don't carry this too far. The other side will try the same (as we shall see), but you are more likely to get away with it.

More and more litigants are representing themselves and the courts are slowly getting better at handling this; acting as a Litigant-in-Person will not only help you, but will also help the next litigant.

There will be occasions when your McKenzie won't be able to attend Court with you. In such circumstances don't be bullied into accepting on-the-spot decisions and ask the Court for an adjournment so that you can get legal advice or attend with your McKenzie at a later date. If you are refused, appeal. You have the right to representation and a fair hearing.

4.5.3. Legal precedents

Litigants in person are still being denied McKenzies in certain circumstances. The following precedents may help you; we take a historical look at the changing attitudes towards McKenzies.

In 1991 in R v Leicester City Justices, *ex parte* Barrow [1991] 2 QB 260 (CA) the judge said,

> *If a party arms himself with assistance in order the better himself to present his case, it is not a question of seeking the leave of the court. It is a question of the court objecting and restricting him in the use of this assistance, if it is clearly unreasonable in nature or degree or if it becomes apparent that the 'assistance' is not being provided bona fide, but for an improper purpose or is being provided in a way which is inimical to the proper and efficient administration of justice by, for example, causing the party to waste time, advising the introduction of irrelevant issues or the asking of irrelevant or repetitious questions.*

The McKenzie (McKenzie v McKenzie [1970] 3 WLR 472 CA) and R v Leicester cases were heard in open court, most cases involving children are heard in chambers; as such this gives rise to problems, and McKenzies have sometimes been excluded from these cases following objections from the other party or on the judge's initiative.

In Re H (Chambers Proceedings: McKenzie Friend) [1997] 2 FLR 423 the Court of Appeal held that a recorder should not have refused a father leave to have a McKenzie friend in an application for contact to his daughter heard in chambers. Unhappily this case was post-trial and no retrial was ordered. The judgement held that only summaries of documents could be shown to McKenzies.

In Re M (Contact: Family Assistance: McKenzie Friend) [1999] 1 FLR 75 the Court of Appeal held that a father should have been allowed a McKenzie friend on an application for contact and other orders. Ward LJ stated that it was 'a matter of regret' that the father had been denied the assistance of a McKenzie friend and said that: 'provided the McKenzie friend acts with restraint he is often a useful assistant to the conduct of litigation'. Re H was cited, but not Re G. Again the ruling was post-trial and no retrial was ordered.

In R v Bow County Court *ex parte* Pelling [1999] 2 FLR 1126 (in which both Re H and Re G were cited) the Court of Appeal stated that a Litigant-in-Person should be allowed to have the assistance of a McKenzie Friend in proceedings heard in public unless the judge was satisfied that fairness and the interests of justice did not require it; the position was the same in relation to proceedings in chambers unless the proceedings were in private, in which case the nature of the proceedings might make it undesirable in the interests of justice for a McKenzie Friend to assist. The Court said that a judge should give reasons for refusing to allow a Litigant-in-Person the assistance of a McKenzie Friend; this important ruling opened the way to challenge poor reasons for refusing a McKenzie and was exploited in the following case.

In **Re H (McKenzie Friend: Pre-Trial Determination) [2001] EWCA Civ 1444**, [2002] 1 FLR 39, the trial judge had refused the father's

application to be assisted by a McKenzie Friend on the ground that, having listened to and observed the proposed McKenzie, he felt that, with the father on his own, the hearing would be fairer, and less adversarial and legalistic.

Allowing the father's appeal Thorpe and Keene LLJ in the Court of Appeal stated that the presumption in favour of permitting a McKenzie was a strong one. The argument in the Court below had necessarily been an adversarial and legalistic one and, since it was unusual for a respondent to oppose an application for McKenzie assistance, as the mother had done vehemently, it was possible that she had thereby contributed to the acrimony. The indefatigable campaigner Michael Pelling, the father's McKenzie wrote,

> *This is believed to be the first case since the original McKenzie v McKenzie [1970] 3WLR 472 CA when on appeal a court has ordered a trial to take place with a McKenzie Friend. It is the first time a specific judge has been ordered to permit a McKenzie Friend in a trial before him. Other cases in the Court of Appeal such as Re H [1997] 2FLR 423 CA and Re M [1999] 1FLR 75 CA have been post the trial and while expressing sympathy the Court of Appeal has not ordered a retrial. In Mr H's case we got to the Court of Appeal before the trial and it was ruled he must be allowed the Friend of his choice.*[241]

In 2005 the Court of Appeal took the opportunity of reviewing the legal position of McKenzie friends in three conjoined appeals reported as **Re O (Children) and Others [2005] EWCA Civ 759**, [2005] 2 FLR 967. In two of the appeals the issue was the refusal of a judge to allow the father's McKenzie Friend to accompany him in chambers and in the other the issue was the question of the extent to which papers in the proceedings could be disclosed to the McKenzie Friend in the light of the restrictions on disclosure then contained in the Family Proceedings Rules 1991 (FPR), rule 4.23 (now superseded by the Family Procedure Rules 2010, **Rule 12.73**).

In a judgement which contained strong criticism of two of the first instance judges the Court of Appeal pointed out that the right to a fair hearing under Article 6.1 of the European Convention on Human Rights is engaged on any application by a Litigant-in-Person for the assistance of a McKenzie Friend.

The Court made a number of observations, some of which have been incorporated into the *President's Guidance*,

1. The purpose of allowing a Litigant-in-Person the assistance of a McKenzie Friend is to further the interests of justice by achieving a level playing field and ensuring a fair hearing. The presumption in favour of allowing a Litigant-in-Person the assistance of a McKenzie Friend is very strong. Such a request should only be refused for compelling reasons and should a judge identify such reasons, she/he must explain them carefully and fully to both the Litigant-in-Person and the would-be McKenzie Friend.

2. Where a Litigant-in-Person wishes to have the assistance of a McKenzie Friend in private family law proceedings relating to

[241] http://www.fnf.org.uk/law-policy/mckenzie-friends/mckenzie-friend-precedent

children, the sooner that intention is made known to the Court and the sooner the court's agreement for the use of the particular McKenzie Friend is obtained, the better.

3. In the same way that judicial continuity is important, the McKenzie Friend, if he is to be involved, will be most useful to the Litigant-in-Person and to the Court if he is in a position to advise the litigant throughout, and is present when the application for his assistance is made, so that the judge can be satisfied that the McKenzie Friend fully understands his role and, in particular, the fact that disclosure of confidential court documents is made to him for the purposes of the proceedings only.

4. In this context it will always be helpful for the Court if the proposed McKenzie Friend can produce either a short curriculum vitae or a statement about herself/himself, confirming that she/he has no personal interest in the case, and that she/he understands both the role of the McKenzie Friend and the Court's rules as to confidentiality.

5. It is not good practice to exclude the proposed McKenzie Friend from the courtroom or chambers whilst the application by the Litigant-in-Person for his assistance is being made. The litigant who needs the assistance of a McKenzie Friend is likely to need the assistance of such a friend to make the application for his appointment in the first place.

6. The following do not, of themselves, constitute 'compelling reasons' for refusing the assistance of a McKenzie Friend:

   i. that the Litigant-in-Person appears to the judge to be of sufficient intelligence to be able to conduct the case on his own without the assistance of a McKenzie Friend;

   ii. that the Litigant-in-Person appears to the judge to have a sufficient mastery of the facts of the case and of the documentation to enable him to conduct the case on his own without the assistance of a McKenzie Friend;

   iii. that the hearing at which the Litigant-in-Person seeks the assistance of a McKenzie Friend is a directions appointment, or a case management appointment;

   iv. that the proceedings are confidential and that the Court papers contain sensitive information relating to the family's affairs.

4.5.4. Right of audience

The question often arises in family cases as to whether the McKenzie Friend can address the Court; this is called 'Right of Audience'. There are times when it may be desirable for your McKenzie to address the Court, rather than do it yourself. Examples would be when there is a complex point of law to argue, or when cross-examining your ex.

A McKenzie Friend has no automatic right of audience but under **Schedule 3, 1(2)(b)** of the Legal Services Act 2007 may be granted the right of audience by the Court in relation to the proceedings. This right is not transferable to other proceedings.

It remains up to the judge of the day to exercise his discretion. The judge will be bound by the principle that his discretion is 'to be exercised only in exceptional circumstances'. This was the ruling of Lord Woolf MR in D v S (Rights of Audience) [1997] 1 FLR 724[242] when he denied a McKenzie right of audience; he added that the right was not to be a matter of consent for the parties but was to be granted only by the judge.

In Clarkson v Gilbert [2000] 2 FLR 839[243] Lord Woolf allowed a husband to represent his wife; he said,

> *The overriding objective is that the courts should do justice. Now that legal aid is not available as readily as it was in the past means that there are going to be situations where litigants are forced to bring proceedings in person when they will need assistance. However, if they are litigants in person they must, in my judgment, establish why they need some other person who is not qualified to appear as an advocate on their behalf. In the ordinary way it will be for them to satisfy the Court that that is appropriate. If somebody's health does not, or may not, enable them to conduct proceedings themselves, and if they lack means, those are the sort of circumstances that can justify a court saying that they should have somebody who can act as an advocate on their behalf.*

In May 2005 the President of the Family Division, Sir Mark Potter, gave the following guidance,

> *A court may grant an unqualified person a right of audience in exceptional circumstances only and only after careful consideration (D v S (Rights of Audience) [1997] 1 FLR 724, Milne v Kennedy and Others [1999] TLR 106, Paragon Finance PLC v Noueiri (Practice Note) [2001] 1 WLR 2357). The litigant must apply at the outset of a hearing if he wishes the MF to be granted a right of audience or the right to conduct the litigation (Clarkson v Gilbert [2000] 2 FLR 839).*

He repeated this guidance without the case citations in April 2008 in *President's Guidance: McKenzie Friends*,

In **Re N (A Child) (McKenzie Friend: Rights of Audience) [2008] EWHC 2042 (Fam)** Munby J allowed the mother's McKenzie right of audience in a case in which the father's McKenzie, Michael Pelling, by virtue of being a solicitor's clerk, had already been granted it, though in the final hearing the father was represented. Munby reviewed the authorities and current court practice, and repeated the points established in Clarkson v Gilbert that there is no automatic right of audience for McKenzie friends: the law allows the judge unfettered discretion, and thus such an order **need not only be made in 'exceptional circumstances'**. In each case the judge must decide whether its circumstances are 'exceptional'. He repeated Woolf's rule, 'the overriding objective is that the courts should do justice'.

> *41. But this is not to say that, as a general principle, such an order can be made only in 'exceptional' circumstances. As Clarke LJ pointed out in Clarkson v Gilbert [2000] 2 FLR 839 at para [28], that would be, in effect, to read restrictive words into a statute which confers an unfettered discretion. Moreover,*

[242] http://www.bailii.org/ew/cases/EWCA/Civ/1996/1341.html
[243] http://www.bailii.org/ew/cases/EWCA/Civ/2000/3018.html

both Waller LJ (at para [26]) and Clarke LJ (at para [30]) were quite clear that the judge at first instance (Eady J) had misdirected himself in law and applied the "wrong test" in saying that such an order could be made only in exceptional circumstances.

42. *As Clarke LJ said (at para [28]), "There is a spectrum of different circumstances which may arise so that it is difficult to lay down precise guidelines. Cases will vary greatly." He added (at para [29]), "All will depend upon the circumstances." At one end of the spectrum there will be the 'professional' McKenzie Friend who acts also as an advocate, the person, as Lord Woolf CJ put it (at para [20]), "setting themselves up as an unqualified advocate" or, as Clarke LJ put it (at para [28]), "holding himself out as providing advocacy services, whether for reward or not." There, as a general principle, the Court will make an order only in exceptional circumstances. At the other end of the spectrum there will be the McKenzie Friend who is the litigant's spouse or partner, though even there, as Clarke LJ was careful to point out, the circumstances may vary widely. In between - and Mr Holden falls somewhere between the two ends of the spectrum though as it seems to me much nearer the spouse / partner McKenzie Friend end of the spectrum than the "professional" McKenzie Friend advocate end of the spectrum - there will be a very wide range of circumstances which it is futile and indeed impossible to classify or categorise. One is, after all, faced with a spectrum and not, as some of Mr Bogle's submissions tended to suggest, a set of pigeon holes.*

43. *At the end of the day one has to remember that, as Lord Woolf CJ put it (at para [17]), "The overriding objective is that the courts should do justice." And one also has to bear in mind, as he observed, the reality that legal aid is not available as readily as it was in the past, leading, as the President's Guidance: McKenzie Friend [2008] 2 FLR 110 comments, to the growth of litigants in person in all levels of Family Court. Moreover, as the Guidance reminds us, "the attendance of a McKenzie Friend will often be of advantage to the Court in ensuring the Litigant-in-Person receives a fair hearing." Similarly, in my experience, there will be occasions - sometimes; sometimes not - when the grant of rights of audience to a McKenzie Friend will, to adopt the President's words, be of advantage to the Court in ensuring the Litigant-in-Person receives a fair hearing. Sometimes, indeed, it will be essential if justice is to be done and, equally importantly, perceived by the Litigant-in-Person as having been done.*

This judgement led Potter to revise the *President's Guidance* again, adding this paragraph:[244]

> *While the Court should be slow to grant any application under s.27 or s.28 of the Act from a MF, it should be prepared to do so for good reason bearing in mind the general objective set out in section 17(1) and the general principle set out in section 17(3) of the Act and all the circumstances of the case. Such circumstances are likely to vary greatly: see paragraphs 40-42*

[244] http://www.judiciary.gov.uk/docs/pfd_guidance_mckenzie_friends_oct_2008.pdf

of the judgment of Munby J. in Re N (A child) (McKenzie Friend: Rights of Audience) [2008] EWHC 2042 (Fam).

Before being superseded by the Legal Services Act 2007 the Courts and Legal Services Act 1990 at Section 17(1) established the general objective of making 'provision for new or better ways of providing [legal] services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice'.

Section 17(3) set out the rules which apply to professional advocates or to members of other bodies which provide legal services and which have enforceable rules of conduct. We would argue strongly, particularly in light of the Steve Stephenson incident, that any organisation which provides its members with McKenzies or other advice should have clear, simple and enforceable rules of conduct.

If you wish your McKenzie to be granted right of audience you must make the request at the start of the hearing. It is unlikely that the Court will allow your McKenzie to stand in for you throughout the entire hearing, and more likely that he will be allowed audience only at certain points. The circumstances do not have to be 'exceptional' but it will help your case if you can demonstrate that they are by using as many of the following points as apply to you:

- You are of low intelligence;
- You have a speech impediment;
- You are in poor health;
- You do not have the financial wherewithal to buy professional representation and have been refused legal aid. You will probably also need to show you have tried the Pro Bono Unit (see the end of this chapter at **Section 4.6.1**);
- You have previously been represented and have suddenly run out of funds;
- Your solicitor is no longer representing you;
- The other party is represented and it is in the interests of justice that you have someone speaking for you who understands the system;
- You are in a highly emotional state;
- Your McKenzie will be able to represent you more efficiently and expeditiously than you could yourself;
- You need your McKenzie to cross examine your children's other parent or a witness you would find it distressing to cross examine yourself, and whom you would be unable to cross examine calmly or rationally;
- You need your McKenzie to argue a point of law you do not yourself fully understand.

In practice many judges are allowing McKenzies right of audience without obliging litigants to make these arguments. In an overloaded system it eases the pressure on it by enabling arguments to be put

more clearly and efficiently and it saves valuable court time as well as keeping hostilities to a minimum. This has to be in the interests of justice.

4.5.5. Anonymisation fallacy

Don't fall for the anonymisation fallacy. Section 97 of the Children Act criminalises identification of children; the Attorney-General has never prosecuted anyone for breach of this, but if you publish other details prosecutions have been brought and may well be brought again. If you cannot publish your judgement including the names of parties then you cannot identify yourself and you cannot publicise the injustice you have suffered in the secret Family Courts.

Anonymous campaigning is almost a contradiction in terms. Suppose (which if the press had followed the law would have been the case) that the matter between the former Home Secretary David Blunkett and Kimberley Quinn had been covered rigorously according to the law with no identification of parties: the story would have been worthless and the press would not have wasted newsprint on it.

You do not 'protect' your child by concealing his name and his parents' names – you are rather insulting him and them; there is no evidence that harm will befall him. And you are allowing the State a right of censorship. As Michael Pelling challenged the judges at the European Court of Human Rights at his oral hearing in November 2000 (confronting the ECHR's decision to anonymise his own and A Bayram's cases): 'Censorship is the first and strongest weapon of the totalitarian state; it was used in Nazi Germany and Soviet Russia; does the Court want to be seen to be upholding such practices?'

In the subsequent Grand Chamber application (refused) Pelling wrote,

> *A person's identity is perhaps his most precious possession as a human being. To rob him of his identity and reduce him to an anonymous cipher is degrading treatment worse than torture (the two often go together). Jews in the Nazi death camps were identified by numbers stamped or tattooed upon their bodies.*

The fact is that Section 97 does not exist to prevent publication of celebrity cases like Bob Geldof and Blunkett but to suppress the rights of the average father to highlight the routine injustice which is being meted out in his case by the family justice system of England and Wales. It is the legislative equivalent of tearing your tongue out by its roots. Do not be deceived: you are not helping your children or the children of others by allowing the State to rob you of their and your identity within the family justice system. This does not happen in Scotland and other Council of Europe jurisdictions: so why tolerate it in England and Wales?

4.6. Other Sources of Advice

There are a couple of places where you are able to obtain free (*pro bono*) professional legal advice and support on various aspects of family law. Citizens Advice Bureaux are not much help with family law but can put you in touch with local projects. Some Law Centres can offer family law advice, or law students at the nearest university.

From October 2011 the Legal Services Act 2007 allows a relaxation of how legal services are sold, so we may see businesses like supermarkets providing these services in the same way that they now offer banking and insurance.

4.6.1. The Pro Bono Unit

The Pro Bono Unit of the Bar Council is a charity which helps you to find free legal help from volunteer barristers. This help is only available if you cannot afford to pay for legal representation or obtain legal aid.

Their website is here, **http://www.barprobono.org.uk/**. You will need to complete an application form and send them photocopies of most of the documents in your bundle.

4.6.2. The RCJ Advice Bureau

The second source of help is the Citizens Advice Bureau which has offices at the Royal Courts of Justice (tel: 020 7947 7701) and at the Principal Registry of the Family Division in High Holborn. The High Holborn office runs a Pro Bono Family Advice Service staffed by family law solicitors from local City firms.

Advice sessions in all areas of family law are run on a first-come-first-served basis from 10:00 to 13:00 and from 14:00 to 17:00 on Mondays, Wednesdays and Thursdays. They can also help you with filling out forms and documents.

View their website here, **http://www.rcjadvice.org.uk/family-law.php**.

4.6.3. Quackery

4.6.3.1. Freemen-on-the-Land

There are, frankly, some very odd people working in this area and giving advice which will quite probably destroy your chances of winning any case. One such group is the Freemen-on-the-Land. The best way to understand them is to think of them as a religious cult, but using legal rather than religious ideas. Freemen hold the eccentric belief that western democracies such as Britain and the US operate under Maritime/Admiralty Law as opposed to Civil Law. They believe that they themselves are bound only by the Common Law and that the

Maritime Law operates as a form of contract which binds them only if they consent; they consider themselves independent of governmental jurisdiction and lawfully entitled even to refuse arrest.

Freemen believe that, in common with all legal documents, birth certificates rob us of our personal liberty, but only if your name is in capital letters; your name in lower case letters represents the *real* you. Because the birth certificate is imposed on an infant, they regard the contract thus formed between the infant and the State to be illegitimate. They therefore consider the real, natural you and the legal persona they refer to as the Straw Man to be distinct, and that in all legal dealings, the State engages only with the Straw Man, represented by your birth certificate.

It is a relatively new belief system, dating only to 2008, which began in Canada, spreading to the US and Britain soon thereafter. In the US it is linked to militia groups and in the UK and elsewhere with conspiracy theorists such as David Icke. Freemen have a particular way of expressing themselves using quaint turns of phrase and extravagant use of capitalisation.

Consider the case of Vicky Haigh (**Doncaster Metropolitan Borough Council v Haigh [2011] EWHC B16 (Fam)**), a moderately well-known trainer of race horses, who had alleged that her daughter was being abused by the girl's father. Vicky fell in with a Freewoman called Elizabeth Watson who encouraged her not to engage with the legal process and used Haigh to further her own, very peculiar, agenda. The result was that Haigh lost contact with her daughter entirely and was banned for 2 years from making further applications. Watson was imprisoned or 9 months for contempt, though she was released after a week (**Doncaster Metropolitan Borough Council v Watson [2011] EWHC B15 (Fam)**).

4.6.3.2. Maxim Law

Maxim law is related to the Freemen-on-the-Land principles and is peddled by the same practitioners. It is based on a number of maxims held to be established and universal principles of law and which are derived from various sources such as Bouvier's Law Dictionary of 1856, Black's Law Dictionary and Roman Law (which is why many of the maxims are in Latin – often incorrectly translated). Several maxims are based on the sayings of Christ or on other biblical sources, and are therefore regarded as the word of God, and thus higher than 'man's law'.

Unfortunately this leads to contradictions and delusions which simply won't help you at all in Court. Take, for example, the maxim, from the book of Genesis, that man and wife are legally one body. A second maxim follows logically from this that a husband or wife cannot testify or bear witness against the other. Manifestly that is nonsense; if it were true we could end this book here! Shouting, 'A son is a part of the father!' at a judge isn't going to help your cause, and putting it into Latin (*filius est pars patris*) doesn't make it less ridiculous. We understand how desperate you may become, but this really is a route to be avoided.

The family justice system is an absolute scandal, but it is the only option you will have in many circumstances. Engage with it, understand it as best you can and learn how to use it to your advantage. These

new-age approaches may be tempting, but as strategies for restoring contact with your children they are disastrous. Learn how to spot these misguided people and avoid them.

4.6.4. Parenting organisations

There is a number of organisations offering constructive support and advice to parents of both genders and to grandparents. These groups vary widely in approach, competence and integrity. There is a fuller list in **Resource 3** at the end of this e-Book, and we mention only a handful here. As a general rule you are advised to avoid those with extreme ideologies, and those which derive much of their funding from the Government: they are unable to give you entirely independent or honest advice. Also avoid those which charge excessively for their services – no one should consider it appropriate to profit from family breakdown. There are positive signs that some of these groups are beginning to work together.

4.6.4.1. Wikivorce

A relatively **new website** with a growing range of resources and an active forum populated by experienced parents and lawyers as well as litigants new to the Family Courts. A good place to try out ideas and gauge the reaction of your peers before using them in Court. It also publishes a regular 'Wikizine' containing a variety of articles. Heavily weighted towards the financial side of divorce and towards mothers, but that is largely a reflection of its membership. It has a particularly strong Scottish membership.

4.6.4.2. Families Need Fathers

Perhaps the best known of the fathers' groups after *Fathers 4 Justice* and probably the oldest, established in 1974. ***Families Need Fathers*** (FNF) no longer campaigns for changes to the family justice system and derives much of its funding from Government, so it has to keep its nose clean. Members who query its policy of government appeasement are expelled.

FNF runs member fora and provides leaflets on various topics (PAS, the Scottish Family Courts, preparing bundles, etc.), though you will have to pay separately for each one and much of the information in them is out-of-date. It also runs probably the largest network of McKenzie Friends in the country, though many of them will charge substantially for their services. Rumoured to be in melt-down.

4.6.4.3. MATCH

Mothers Apart from their Children, established in 1979, is possibly the best option for mothers with contact problems after Wikivorce; they provide support for mothers who are apart from their children because of ill-health, fostering, adoption, abduction abroad, alienation following high-conflict family breakdown or family rows.

4.6.4.4. NACSA

The National Campaign for Child Support Action is undoubtedly the best resource available for help with child support, whether you are paying child support or in receipt of it.

4.6.4.5. Women's Aid

Women's Aid is an extreme gender-feminist organisation lobbying for a presumption of no contact between fathers and their children following family breakdown unless the father can prove that it is 'safe'. They are also behind the very gendered presentation of domestic violence. We discussed their activities and beliefs in *Family Justice on Trial*.

It is worth mentioning that in a few recent cases a mother has sought to introduce into proceedings a report by *Women's Aid*. The organisation has no relevant qualifications for writing these reports and no competence to give opinions on matters which arise in the Family Courts. A responsible judge will throw out an unsolicited report without hesitation; if it is not thrown out you must object on the grounds that the Court has not ordered the report.

If the Court insists on entering the report into proceedings you must demand that you be allowed to cross examine the report's author, just as you would cross examine a CAFCASS FCA who had produced a Section 7 report. The chances are that the author will then withdraw the report rather than be cross examined.

4.7. Cases

McKenzie Friends

Collier v Hicks [1831] 2 B & Ad 663
McKenzie v McKenzie [1970] 3 WLR 472
Hart v Aga-Khan Foundation (UK) [1984] 2AER 439 CA
Re G (A Minor) (Chambers Hearing: Assistance) [1991] 1 WLR 1828 Note [1999] 2 FLR 59
R v Leicester City Justices, ex parte Barrow [1991] 2 QB 260 (CA), 3 All ER 935
D v S (Rights of Audience) [1996] EWCA Civ 1341, [1997] 1 FLR 724 (CA)
Re H (Minors) (Chambers Proceedings: McKenzie Friend) [1997] 3 FCR 618 (CA) ex parte Pelling
Re H (Chambers Proceedings: McKenzie Friend) [1997] EWCA Civ 1436
Re G (Chambers Proceedings: McKenzie Friend) [1999] 2 FLR 59
Re M (Contact: Family Assistance: McKenzie Friend) [1999] 1 FLR 75
R v Bow County Court ex parte Pelling [1999] EWCA Civ 2004, 2 FLR 1126, 4 All ER 751
Re H (McKenzie Friend: Pre-Trial Determination) [2001]
Clarkson v Gilbert [2000] EWCA Civ 3018
R v Secretary of State for the Home Department Ex Parte Gunn [2001] EWCA Civ 891
Re H (McKenzie Friend: Pre-Trial Determination) [2002] 1 FLR 39, EWCA Civ 1444, [2002] 1 FLR 39
Re D (Intractable Contact Dispute: Publicity) [2004] EWHC 727
Re O (Children and Others) [2005] EWCA Civ 759, [2005] 2 FLR 967
Re F (Family Proceedings: Costs) [2008] EWCA Civ 938
Re N (A Child) (McKenzie Friend: Rights of Audience) [2008] EWHC 2042 (Fam)

CHAPTER 5: ORDERS

The State must declare the child to be the most precious treasure of the people. As long as the government is perceived as working for the benefit of the children, the people will happily endure almost any curtailment of liberty and almost any deprivation.

Adolf Hitler, *Mein Kampf*, 1925-26

5.1. The Children Act 1989

5.1.1. Introduction of the Act

The Children Bill, which emphasises the importance of both mothers and fathers in child-rearing, will end the inhuman, callous and cruel practice of divorcing a child from one of his or her loyal and devoted parents.

Sir Raymond Powell[245]

If you are forced to go to Court over child contact issues your options are circumscribed by the Children Act 1989[246] and its amendments, especially those under the Children and Adoption Act 2006. You are limited to applying for one or more of a small number of Court Orders contained within the Act. How the Court then makes its decision is also defined by the legislation, in particular by the three principles which we outline below.

[245] Sir Raymond Powell (Labour, Ogmore) during Commons debate, 27 April 1989, Hansard: http://www.publications.parliament.uk/pa/cm198889/cmhansrd/1989-04-27/Debate-7.html
[246] http://www.opsi.gov.uk/acts/acts1989/ukpga_19890041_en_1

The 1989 Children Act was about **power** and the transfer of power. It radically changed the relationship between children and their parents: it seized the authority parents had over their children, and handed it to the State, giving the Court unprecedented influence over the family; it infantilised parents, rendering them unable to make even the most elementary decisions without litigation. It disregarded rights and did not enforce responsibilities; it failed signally to protect children and left parents impotent in the face of corrupt or merely stupid state officials.

The Act was timid, imprecisely written, full of half measures and misrepresented the will of Parliament. 'The inhuman, callous and cruel practice of divorcing a child from one of his or her loyal and devoted parents' continues unimpeded and unabated. It established the family no longer as a secure haven but as 'a seething nest of abuse from which battered wives and molested children may at any time need to be rescued.'[247]

On 27th April 1989 the Children Act 1989 was introduced to a full House of Commons with a great sense of optimism and achievement by David Mellor, the Health Minister; he said,[248]

> *We have high ambitions for this Bill. We hope and believe that it will bring order, integration, relevance and a better balance to the law – a better balance not just between the rights and responsibilities of individuals and agencies, but, most vitally, between the need to protect children and the need to enable parents to challenge intervention in the upbringing of their children.*

Mellor's claim revealed the inadequacies widely known to exist in the existing legislation. The Act became law on 14th October 1991. It is evident now that the claims made for it ring hollow: it has failed to live up to expectations and parents are forced in ever greater numbers to resort to legal proceedings.

The 1989 Children Act incorporated into statute law the new practices introduced by the judiciary and consolidated the principle that the child's interests were paramount; we have already exposed that in the **Introduction** both as a tautology and as a stalking-horse behind which the State nationalised the country's children. Hoggett – subsequently Baroness Hale – considered the Act her greatest achievement; it no longer supported marriage because 'it has adopted principles for the protection of children and dependent spouses which could be made equally applicable to the unmarried.'[249]

In reality the Act removed the ultimate right of parents to make decisions in the best interests of their children and extended the transfer of authority over children to the State. As the parental functions of marriage have been usurped by the State marriage has inexorably been emasculated. Men are disenfranchised, family assets are consumed, and lawyers grow fatter despite providing a service which is rarely of benefit to their clients. Hale attempted to incorporate the 'no fault' principle further into statute law by means

[247] Peter Hitchens, *The Abolition of Liberty*, 2003, p.45 (paperback edition)
[248] Hansard, 27 April 1989
[249] Brenda Hoggett, quoted by Daniel Amneus, *The case for father custody*, Fathering Magazine, 20 September 2002

of the Family Law Act 1996, however, the relevant section was never enabled, possibly as a result of campaigning by fathers' rights groups. Let us look in more detail at the primary piece of legislation which enables the State to intervene in the upbringing of your children.

5.1.2. Children's acquisition of rights

The Children Act 1989 does not contain a definition of a child. For most purposes the relief available under the Act applies to children from the time of birth until their 16th birthday. In exceptional cases – where a child has special needs, for example, the upper age limit is their 18th birthday.

For the purposes of child support legislation the upper age limit is determined by the date a child finishes full-time education.

A child only acquires rights at birth. Prior to birth he has no rights and is regarded as an integral part of his mother. A woman can refuse medical treatment of an unborn child which the Court can impose once the child is born. An unborn child cannot be made a ward of court (Re F (In Utero) [1988] CA).

Article 2 of the European Convention on Human Rights which protects the right to life does not apply to the unborn. In 2004 a woman, Mrs Thi-Nho Vo, whose pregnancy was wrongly terminated in a French hospital, took her case to the European Court of Human Rights (Vo v France (2005) 40 EHRR 12) arguing that her unborn child had the right to life and that the termination was manslaughter. The Court rejected her claim.

A cryogenically stored embryo has no right to life (Evans v Amicus Healthcare [2004] Civ 727).

Abortion is legal up to the end of the 24th week of pregnancy and provided that two registered medical practitioners have given their approval (**Section 1**, Abortion Act 1967).

In 2004 West Mercia police chose not to prosecute two doctors who had approved the abortion at 28 weeks of a foetus suffering from a cleft palate. The Reverend Joanna Jepson, who had herself been born with a facial deformity, obtained leave to challenge the decision by judicial review. Jepson disputed that a cleft palate constituted a 'serious handicap' under Section 1(d) of the Act – the law does not define the term. The challenge was unsuccessful.

The legalisation of abortion does not place an obligation on a doctor to abort a handicapped child, and a child born handicapped cannot sue the doctor (McKay v Essex [1982] HA).

Only medically procured abortion is lawful. A woman who attempts unlawfully to procure her own miscarriage, or anyone who assists her, is guilty of an offence under the Offences Against the Person Act 1861. This has been interpreted to mean that anyone who does so *lawfully* is not guilty of a felony. Anyone who causes the death of an unborn child commits an offence under the Infant Life (Preservation) Act 1929. A threat to kill an unborn child, however, is not a threat to kill a third party (R v Tait [1990] CA).

5.2. First Principles

5.2.1. The welfare of the child

The first principle of the Children Act 1989 is 'that the child's welfare shall be the court's paramount consideration.' This is the so-called paramountcy principle, and it has been slavishly reiterated. For a discussion of the history of this principle see the **Introduction**. This welfare test must be applied in every case (provided that proceedings are under the Children Act), and demands that cases be decided on the child's welfare and not on any other factor. The wishes or 'rights' of either parent are immaterial in the eyes of the law; 'contact', for example, is the child's right to see the parent, and never the other way around.

Associated with this principle is the Welfare Checklist, also referred to as *The Voice of the Child*, which is a list of those issues to be considered whenever a Section 8 order is made or changed; see the Section 7 Report Template at **Section 7.4.2** of this work which contains the Checklist and the CAFCASS interpretation of it. The Court (and CAFCASS) must always consider the Welfare Checklist in its decisions about children and you must let it guide you when presenting your case.

a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

The Court must consider the child's wishes and feelings if he is old enough to express them; this is achieved through a '**needs, wishes and feelings**' report. CAFCASS will record – and interpret – what the child expresses and how he behaves, seeking input from other practitioners if necessary. The age at which a child becomes competent is referred to as '**Gillick**' competence. Chapter 11 deals with how a child's wishes can be ascertained in complex cases.

b) his physical, emotional and educational needs;

Physical needs cover things like accommodation (will your child have his own bedroom?), food, clothing and medical requirements. The courts will also consider how your work routine affects your ability to care for your child, how close to the school you live, what transport will you use? You also need to look at things like child minders and after-school clubs.

Emotional needs are less clear cut, but the Court will consider the effect on your child of any continuing conflict or exposure to arguments. Can handovers be conducted civilly? Will he be separated from a sibling or step-sibling or a relative he is close to?

You should be able to agree your child's education with the other parent, otherwise the Court will have to make the decisions for you. What impact will a change of school have? Will your child be able to maintain contact with old friends?

If necessary CAFCASS will elicit information from your child's school, his doctor, health visitor and other professionals who have been involved with him.

c) the likely effect on him of any change in his circumstances;

The Court will consider any change in residence and separation from one or other parent – especially a move abroad, and changes in schooling, etc.

d) his age, sex, background and any characteristics of his which the Court considers relevant;

The Court is looking here particularly at issues surrounding 'diversity' and how they are being addressed and met by each parent. This includes any disability he has, his heritage, culture and religion. Obviously this is more about political correctness than your child's welfare.

The older a child is the less willing the Court will be to make an order; ordering a teenager to have contact with a parent against his will can be counter-productive if the child thinks his views are being ignored.

The effects of separation on a child will be reduced if he can continue with familiar activities; older children will require more flexibility than younger ones. Whether children are still breast-feeding will influence how a court decides. Boys and girls have different needs and need each parent to a different extent at different times of their lives, such as puberty. Some CAFCASS officers still have very unenlightened views on these issues.

e) any harm which he has suffered or is at risk of suffering;

The Court will have to consider any allegations of violence or abuse made by one parent against the other. They will also want to know if your child has witnessed domestic violence. They will seek input from schools, social services, and agencies like the NSPCC, and consider in particular whether any action has been taken to protect the child.

This is a serious issue and will be considered in greater detail elsewhere. The Court will also consider the effects on your child of continuing conflict. Conflict will be less where parenting is shared.

f) how capable each of his parents, and any other person in relation to whom the Court considers the question to be relevant, is of meeting his needs;

CAFCASS will assess the parents and any other relevant adult, bearing in mind what has been said about them by the other parties, and their attitude to the child's wishes and feelings.

Parents often make allegations that the other is unable properly to care for their children. No one is born a parent, and we all have to learn; if you are denied that opportunity, you will be less capable. If your child has special needs it is important you know how to provide these, and there is no shame in asking for help from the appropriate quarter.

g) the range of powers available to the Court under this Act in the proceedings in question.

The Court has wide powers to make a variety of orders which we shall discuss later in this chapter, though its first duty is to make no order unless absolutely necessary.

The effect of this is that the Court and others involved in the decision-making process, such as CAFCASS officers or expert witnesses, must put together a view of what is in the child's best interests which will necessarily be individual and subjective. The law offers no absolute guidance on what is or is not in a child's best interests; decisions must depend on the particular case and the professionals' discretion.

There is similar confusion over the definition of 'harm'. In Section 31 of the Act it is defined thus:

> *"harm" means ill-treatment or the impairment of health or development;*
>
> *"ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical, including, for example, impairment suffered from seeing or hearing the ill-treatment of another.*
>
> *"health" means physical or mental health; and*
>
> *"development" means physical, intellectual, emotional, social or behavioural development;*

The final definition of 'ill-treatment' was introduced by Baroness Hale's amendment in **Section 120** of the Adoption and Children Act 2002. No consideration was given in the Children Act 1989 to the potential impact on a child of the resident parent's behaviour, and there was no adequate provision for enforcing a contact order when it is breached, though this has been somewhat mitigated by the provisions of the Children and Adoption Act 2006. The effect is that the child's welfare becomes entirely subordinated to that of his resident parent – usually the mother; the welfare of the child is assumed to depend on the resident parent's, or more accurately, on her happiness, so satisfying her demands has come to be the usual way in which the courts interpret this prerequisite.

Conflict can arise when there is more than one child to consider, for example when the mother is herself a minor. The crude rule-of-thumb the courts tend to employ in that case is to consider only the interests of the child who is the subject of the application; see F v Leeds City Council [1994] 2 FLR 60. In particular there are certain categories of case, such as leave to remove cases, where parents' interests come into conflict with their children's, exposing how simplistic the welfare principle is.

The welfare principle is only paramount where proceedings take place under the Children Act. Where other legislation is concerned – for example, where sanctions are being imposed to enforce a Contact Order under the Criminal Justice Act 2003 – the welfare principle will not be paramount.

5.2.2. The avoidance of delay

The second principle is that 'In any proceedings in which any question with respect to the upbringing of a child arises, the Court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.'

There will be circumstances where delay is a sensible course of action. In Re B (A Minor) (Contact) (Interim Order) [1994] 2 FLR 269 magistrates objected to an agreement between two parents that the father should have supervised contact in a contact centre with a review in four months; they said that it introduced delay. The appeal judge overturned the objection because it would have denied the child four months of beneficial contact.

Giving evidence to the Select Committee on Constitutional Affairs, the President of the Family Division, Dame Elizabeth Butler-Sloss, emphatically denied that tactical delay takes place; the legal profession was equally forceful.[250] The reality to which most fathers will testify is that delay is the norm and there are habitually periods of many months between hearings while reports of doubtful benefit are prepared by welfare officers or while applicants wait for times when all parties, solicitors, barristers and others can attend Court. Many cases drag on for years. The Select Committee concluded,

> *Given the strong animosity between the parties which is common in contested family cases, we find it hard to believe that tactical delay is not sometimes used to the advantage of resident parents... The resident parent who is involved in the contact dispute will be advantaged by any delay, even if the resident parent is behaving unreasonably.*

[250] Select Committee on Constitutional Affairs, Fourth Report, http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/116/11606.htm#a7

Astonishingly a report into tackling delay by HMICA[251] found that 'delay is not a category of complaint monitored by CAFCASS, so the organisation is unable to use this helpful source of consumer feedback to help assess or understand the nature of concerns about delay from a user perspective, or to show any subsequent action taken to improve matters.'

Delay is your worst enemy. The courts are strongly predisposed to preserving the *status quo ante*; given that contact applications are made only once contact is obstructed, the ***status quo*** becomes the state of obstructed contact rather than the satisfactory contact which existed before. The longer this state continues, the more likely it is that the Court will uphold it. Do not delay making your application; if you do you will never make up that lost time, and whatever your reason, you will give the Court the impression that you aren't really committed.

5.2.3. The 'no-order' principle

The third principle is the no-order principle, 'Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.' The purpose of this principle was to establish the courts as non-interventionist and to encourage parents to reach their own settlements; it was also intended to reduce the

[251] *MCSI Inspection of court Services, Children and Family Court Advisory and Support Service (CAFCASS) Tackling Delay: Report of an inspection carried out during January 2004*, http://www.hmica.gov.uk/files/CAFCASSTacklingdelayreport_inked.pdf

number of orders the courts were making, which were at a very high level before 1989; increasingly the principle is ignored and orders have multiplied; by 2009 orders were up nearly 700% on levels immediately after the Children Act.

5.2.4. The Court

The Children Act 1989 created the new unifying concept of 'the Court', which comprised Magistrates Courts, County Courts and the High Court. The new orders available under the Act could be made at any level within the Court. This meant that proceedings could be transferred with greater ease, and that one no longer had to select a particular court for a particular remedy. The unintended consequence was poor implementation of judicial continuity, and the resultant failure of judges fully to understand a case until it had appeared before them on a number of occasions.

5.3. Section 8 Orders

5.3.1. Four new orders

Orders made under **Section 8** of the Children Act 1989 can be for Residence, Contact, Prohibited Steps and Specific Issues, in 2009 there were 137,480 children involved in applications made to the Family Courts for Section 8 Orders,[252] more than three quarters of these were applications from fathers.[253] We shall consider contact and residence at greater length later in this chapter. Section 8 orders may only apply to issues of Parental Responsibility, and cannot be applied to issues which concern only the adults in a case. The Section 8 orders are:

- Prohibited Steps Orders
- Specific Issue Orders
- Contact Orders
- Residence Orders

Orders made to vary or discharge these orders also come under Section 8.

Once a child reaches the age of 16 any Section 8 order ceases to have effect, and the Court normally will not make new orders other than one to discharge an order. Under exceptional circumstances it can make orders for a child up to the age of 18; if it does the order will cease to have effect once the child reaches 18,

[252] Judicial and court Statistics 2007, http://www.justice.gov.uk/publications/docs/judicial-court-stats-2007-full.pdf
[253] University of Oxford Family Policy Briefing 3, *Child Contact with Non-Resident Parents*, Joan Hunt & Ceridwen Roberts, January 2004.

Section 10 of the Children Act determines who may apply for a Section 8 order. Sections 10(4) and (5) determine the categories of person who may apply as of right (see **Section 6.2.1**).

If you cannot apply as of right you may apply with 'leave', that is, with the permission of the Court, and Section 10(8) sets out what factors the Court should consider in such an application. These applications include those made by the child and 10(8) provides that the Court must be satisfied the child has sufficient understanding to make the application. Usually the initial judgement of the child's understanding will be made by his solicitor, if he has one, but the discretion remains with the Court.

The Court can also make other orders under other sections of the Act, such as contact activity and Enforcement Orders, barring (Section 91) orders and orders allowing or preventing change to the child's name or removal from the jurisdiction. We shall deal with these later in this work.

5.3.2. Prohibited Steps Orders

A Prohibited Steps Order (PSO) 'means an order that no step which could be taken by a parent in meeting his Parental Responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court.' They must not be applied to trivial issues, and their terms must be specific. Examples might include:

- Not to register a birth or name a child without the father;
- Not to change the child's surname;
- Not to give the child inappropriate medical treatment;
- Not to enrol the child at a particular school;
- Not to indoctrinate the child into a particular religion;
- Not to go to a particular place the child frequents, such as his school or a club;
- Not to approach the child in the street;
- Not to remove the child from the care of a particular adult;
- Not to take the child abroad;
- Not to allow the child to participate in a particular activity or visit a particular person.

By interfering with Parental Responsibility, a Prohibited Steps Order can be seen by the Court, or presented by the person to whom it applies, as an attempt by the applicant – usually the father – to control the mother and restrict her rights, and for that reason they can be difficult to obtain. If they cause a mother to live somewhere she cannot afford, or to lose out on a job, etc., they will not be seen by the Court to be in the child's interest which is seen as inseparably dependent on the mother's happiness.

The Children Act also forbids a court to make a PSO in order to obtain a result which could also be achieved through an order for residence or contact. Sooner or later the Court will have to make an order for residence or contact, preferably for shared residence, and it is difficult to see what purpose a PSO can serve that would not be better served by a Residence Order.

A PSO can be used to apply leverage, for example on a parent who is refusing to agree terms of another order, but they are only ever a temporary solution, and they don't address issues of residence or contact.

Applications are made using Form C100 (see below). You should always ask the Court to attach a **penal notice** to the order so that it can be enforced.

5.3.3. Specific Issue Orders

A Specific Issue Order (SIO) 'means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of Parental Responsibility for a child'. For example, but not exclusively:

- What surname the child should be known by;
- Which school the child should attend;
- Whether the child should receive medical treatment;
- How religion should be included in the child's upbringing (including ritual circumcision[254]);
- Whether the person with care can take the child to live abroad.

This is often the area in which family justice achieves an apotheosis of pettiness as parents battle in Court over whether to have a child vaccinated or what state school to send the child to, not because the argument is necessary, but because it enables the parents to continue their dispute in another form. Before you make the application, ask yourself if this is really what highly trained lawyers should be spending their careers doing.

Like a Prohibited Steps Order, it interferes with Parental Responsibility, taking it away from the parents and handing it to the Court, leaving the parents infantilised and unable to make appropriate decisions for their children. When parents are eventually able to come to an agreement, an SIO can be changed or lifted, provided that to do so is in the best interests of the child. Applications for Specific Issues Orders are also made using Form C100.

[254] See Re J (Specific Issue Orders: Muslim Upbringing and Circumcision) [1999] 2 FLR 678

5.4. Contact Orders

5.4.1. Introduction

Until an order is made for contact, assuming you have Parental Responsibility for your child, you are deemed to have equal legal status to the other parent, regardless of how much time your child spends with you. Once a Contact Order is made, however, your status becomes that of a second-class parent. No father should ever accept that.

The consequence of this is that by applying for contact you are in effect requesting the Court to strip you of your equal status and impose on you an inferior status. But they don't tell you that.

To understand this idea further, we suggest you read the section on the **Primary Carer** in the Introduction.

'Contact' describes the first meeting between humans and aliens, or the confrontation between soldiers and the enemy; it is an inexcusable word to use for the fragile, desperate relationships which parents fight to preserve between themselves and their children, and it provides a powerful indication of the inherent inhumanity of the family justice system.

As Bob Geldof so eloquently put it,

> *I cannot even say the words. A huge emptiness would well in my stomach, a deep loathing for those who would deign to tell me they would ALLOW me ACCESS to my children — those I loved above all, those I created, those who gave meaning to everything I did, those that were the very best of us two and the absolute physical manifestation of our once blinding love. Who the fuck are they that they should ALLOW anything? REASONABLE CONTACT!!! Is the law mad? Am I a criminal? An ABSENT parent. A RESIDENT/NON-RESIDENT parent. This Lawspeak which you all speak so fluently, so unthinkingly, so hurtfully, must go.*[255]

Have no truck with those who repeat the mantra that it isn't the *quantity* of contact that matters but the *quality*, there is no quality without quantity. If you only get a couple of hours a fortnight it is quite impossible to enjoy contact of any quality, while you count your minutes ticking away on your wristwatch. The 'quality-not-quantity' brigade simply want to erode your contact further.

'Contact' is what used to be called, in an equally heartless expression, 'access' prior to the 1989 Children Act. Contact Orders replace the old Access Orders just as 'residence' replaced the notion of 'custody'; the intention was that these orders should be viewed from the child's perspective and not the parent's, and so the language of the prison visit was replaced with the language of extra-terrestrial encounter.

An Order for Contact is 'an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise

[255] Bob Geldof, *The Real Love that Dare Not Speak its Name*, p. 175 ff.

to have contact with each other.'[256] In 2008 the courts made nearly 92,000 orders for contact.

The case of **Re L-W (Children) sub nom CPL v (1) CH-W (2) ML-W (3) EL-W (by their Guardian) [2010] EWCA Civ 1253 (CA)** established the limitations of a resident parent's obligations under the law,

> *The father's obligations under each successive order were to "allow" contact and "make M available" for contact. To "allow" is to concede or to permit; to "make available" is to put at one's disposal or within one's reach. That was the father's obligation; no more and no less… The father's obligation, according to Judge Caddick. was to "make sure that he did all that was necessary so that that child would go" and to take "whatever other steps within the exercise of his Parental Responsibility were necessary to make sure that he went". The father may have been under a parental or moral obligation to do these things, but on the wording of these orders he was not, in my judgment, under any legal obligation such as to render him in breach of the orders for failing to do them, let alone for failing to achieve - to "ensure" - that contact actually took place. Nor, with all respect to Mr Walden-Smith, was the father under a legally enforceable obligation to take such steps in the exercise of his parental discipline, guidance and encouragement as were reasonable in all the circumstances to ensure that contact took place.*

This means that even if there is a Contact Order in your favour, should your children express the view – according to the resident parent – that they don't want to see you, the resident parent cannot be compelled to force them.

A Contact Order also cannot oblige an unwilling parent to have contact; see Re L (A Child) (Contact: Domestic Violence) [2000] 2 FCR 404.

It can be seen from the definition contained in the Act that Contact Orders are designed to apply to the resident parent to make the child available to the applicant for a prescribed minimum level of contact; if the resident parent does not comply with the order they are in breach of it and in Contempt of Court. Some Contact Orders merely state that a child and an adult are to have contact with each other, and no one is in breach if the contact does not take place.

There is controversy over whether a Contact Order can only be made once a Residence Order has been made identifying the resident parent. In **Re S (A Child) [2010] EWCA Civ 705** the lower court judge had ruled anachronistically that a Shared Residence Order was not appropriate for two parents who lived no more than 100 miles apart; he made an order, contrary to legislation, providing the periods during which the father would have 'care of the child'. The intention was probably to avoid the contentious word 'contact', but it exceeded the Court's jurisdiction: in making an order the Court must remain within the statutory vocabulary.

On appeal Lord Justice Thorpe quoted Ward LJ in **Re B (A Child) [2001] EWCA Civ 1968** that it is necessary first to determine with whom a child lives before a Contact Order is made because the

[256] Children Act 1989, Part II, 8 (1).

order requires that parent to allow the child to visit or stay with the other parent. Thorpe interpreted this to mean that a Residence Order must first be made to which the Contact Order is then attached. This is contrary to the no-order principle and is rejected by other authorities, Ward himself had already clarified the point in Re G (A Child) [2008] EWCA 1468, arguably rendering Thorpe's ruling '*per incuriam*', i.e. made without due care. In **Re H (A Child) [2011] EWCA Civ 585** Thorpe had the last word,

> *Of course what the statute requires is not in every case that there should be a residence order to which a contact order exists, but that there should be a person defined or capable of definition with whom the child lives. So if the parents agree that, say, the mother should be the primary carer, but do not trouble to get a residence order enshrining her role, still a contact order can be made against her as the person with whom the child lives.*

Conditions can be attached to a Contact Order – and other Section 8 orders – under Section 11(7) of the Children Act which can apply to the applicant, and he will be in breach if he does not comply with these conditions. The applicant can also be in breach of the Contact Order if, for example, the order is only for indirect contact and he tries to have direct contact with the child.

Because he has been unable to resolve the issue of contact without going to Court, a non-resident parent is considered dysfunctional; if a resident parent is preventing contact it is assumed there is some legitimate reason for this. An application for contact is therefore considered inappropriate and perverse. The interpretation of contact by the courts often seems to be to order the applicant not to seek contact beyond the prescribed maximum level. Thus, although a parent who attends a school play or returns a child late after a contact period is not in theory in breach of the order because it does not apply to him, he is *regarded* as in breach and in all probability will be accused of harassment or be treated as though he had breached a Non-Molestation Order, and he will often find himself back in Court with a new order for a reduced level of contact. However, if he decides *not* to take up the contact ordered, he is not in breach of the order.

If a non-resident parent wants contact it is considered by the courts to be his responsibility to cover the costs of travel between the resident parent's home and his. The time taken by the travelling is usually taken out of his contact time. This convention is neither fair nor in the best interests of the child, and a reasonable resident parent should be prepared for a little give and take.

5.4.2. Direct contact

There is a wide variety of parent/child interaction which can be defined as 'contact'. Broadly speaking, contact may either be 'direct' or 'indirect'.

Direct contact involves the child and parent being together in one place; it may either be 'visiting' or 'staying contact':

- Visiting Contact is when your child comes to visit you at your address, but does not stay overnight.

- Staying Contact is when your child stays overnight according to the 'tariff' determined by the Court.

5.4.3. Contact centres

Courts are increasingly ordering that contact between a father and his children should take place in a 'Contact Centre' rather than at home or in any other normal and relaxing environment.

Contact centres are commercial enterprises, so contact in them can be expensive, particularly when it is supervised; there is absolutely no consistency across the country and half an hour can cost anything from £15 to £200, while there will be additional charges for 'setting up' contact. Your children will not be allowed to see you until you pay. Note also that the National Association of Contact Centres, which is supposed to regulate the industry, requires that there should be a period of a month between the order and the date of the first contact so that they can acquire the necessary information about parents and children. This introduces further unnecessary delay, and this is information which the Court and CAFCASS should already have supplied.

Contact Centres are supposed to be independent, but they are not; most are contracted directly to CAFCASS; they get the contract by providing the lowest cost tender.

No one denies that there are situations in which children are at risk and these sessions and contact centres can play a vital role but on the whole it appears that contact centres are being used by the Family Courts as the default position for contact between a father and his children in conflicted cases.

A contact centre is part of the process of validating and sanitising the separation of a child from his parent. In contact centres a number of institutions, charities and church bodies have spotted a profitable outsourcing opportunity to become 'approved contractors', with CAFCASS acting as the 'client' and as the distributor of available Government funding. Contact in a contact centre is a simulacrum of the proper parent/child association, and one which can be watched and monitored, but it is not a relationship.

It stigmatises normal relationships by implying that they cannot take place safely without supervision, and it conveys a clear message to the child that the non-resident parent is dangerous and not to be trusted. It enables the judge to order contact within an institutionally supervised context, in the belief that resident parents would be less likely to prevent such contact. They are thus a fig-leaf placed over the embarrassing fact that Family Courts will not enforce contact or protect children from the elimination of their parents, and so they increase the likelihood of permanent estrangement.

In Lord Justice Wall's report ***Making Contact Work*** it was acknowledged that contact centres had 'been seized upon by courts, lawyers and Family Court welfare services to accommodate their difficult contact cases.' In turn the Labour Government seized upon the report to justify an expansion of contact centres.

Contact centres are overused in more cases and for much longer than is necessary, creating a severe shortage of places; you may have to

wait 4 or 5 months for a place to become available; that's on top of the 9 months you may have had to wait before getting even to this stage.

5.4.4. Supervised contact

Supervised Contact adds another layer of humiliation by having a third party supervise the contact between you and your children. The supervisor may well be unqualified or a member of the centre manager's family. Sessions are commonly limited to just an hour and can cost hundreds of pounds. Their purpose is more to allow social workers and CAFCASS officers to observe parents' interactions with their children than to enable contact. There is no evidence to support the use of supervised contact, and you should never allow supervised contact to continue beyond the specified duration.

Over the last 2 years almost every case which has been brought to Fathers 4 Justice has involved supervised contact, and it seems now to be the default position of the courts in conflicted cases. This puts enormous pressure on contact centres and on their availability for parents; many still open only every other weekend for 2 hours on either a Saturday or Sunday; many also share a venue with other associated services such as Sure Start. This situation is not sustainable given the cuts in children's services by local authorities. This failure of judges to think 'outside the box' is pushing the system into overload.

In **Re C (Abduction: Residence and Contact) [2005] EWHC 2205** the Court ruled that under the Human Rights Act **there must be a presumption of unsupervised contact unless there are good reasons for supervision**. Quote this ruling by Mostyn J if you are ordered supervised contact for no good reason (i.e. substantiated allegations),

> *On the facts of this case it is clear to me that supervised contact would only have been appropriate if there was the most compelling evidence that in some way S's best interests would be jeopardised by unsupervised, normal contact. Given the terms of the Strasbourg jurisprudence* [the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950] *to which I have referred, it is almost as if there is a presumption in favour of normal contact and it is for those who say it is inappropriate to prove by clear evidence why this is so.*

The 'Strasbourg jurisprudence' says at Article 8,

> 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 2. ***There shall be no interference by a public authority with the exercise of this right*** *except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The courts are ignoring the Re C principle. In 75% of cases in which supervised contact is ordered, parents go on to have unsupervised

contact. This raises the question of whether contact should have been supervised in the first place.

5.4.5. Our advice

Contact centres are being overused and the available resources are being exhausted; it is quite common that if there has been any hostility at handovers a father suddenly ends up having to see his children in a contact centre.

If the resident parent will not agree to unsupervised contact entirely – perhaps because you have spent very little time with your child – see if they will agree to supervision by a trusted relative or friend.

One solution is for contact centres to offer 'staggered' handovers as a safer alternative to parents meeting at the local garage or park to hand over children. In staggered handovers one parent turns up at an agreed time, drops the children off at the centre and then leaves; the other parent turns up a short while after to pick up the children. This ensures that the parents don't meet and the children don't have to witness arguments and confrontation. In most cases this is what the courts should be ordering as the default position for contact rather than supervised contact, because staggered handovers provide the same outcome – the children and non-resident parents remain in contact with each other and the parents do not have to attempt pleasantries that often result in an argument.

In fact parents who are going to Court to sort out contact arrangements should be insisting on using contact centres for facilitating contact handovers. This 'insurance policy' goes a long way towards ensuring you will not be back in court 3 months later because things have broken down. It protects both parties from any potential allegations that would result in future litigation. The average cost of this service is £15 a session. We say this is £15 well spent compared with what it will cost you if an argument breaks out at a handover.

The other option available to parents who wish to use external services for handover is the 'pick-up and drop off'. This is not available at every contact centre but it is worth exploring as in some areas social services can offer this service. For those parents who do not want to risk bumping into the ex in the contact centre car park even as part of a staggered handover arrangement, the 'pick up and drop off' service eliminates any possibility of contact. A member of staff can come to your home, or another pre-arranged location, and pick up the children form you, and take them to the other parent's house, or to a pre-arranged location. The cost of this service can vary but usually you have to pay a fee for the case worker plus a mileage allowance for their journey to and from the parents. This is probably the safest of all services as there is absolutely no chance of disputing parents meeting.

The problem is that once in Court you are usually given a very limited choice of services because the CAFCASS officers themselves do not know what services are available. The best solution is to be prepared. Before you go to Court, even if you are wanting unlimited contact, approach all the contact centres in your area and ask them for details of their services and always ask them if they would be prepared to offer services such as staggered handovers and pick-ups and drop-offs. They might not offer those services on a regular basis

but explore the options with them so that once in Court you are not forced into the one-size-fits-all supervised contact in a contact centre that is being dealt out because mum and dad do not like each other and cannot help slagging each other off in front of the children whenever they meet.

Use of a contact centre must be for a specific purpose and for a defined period of time. **Both limitations must be set out clearly in the order**. Only use a contact centre as part of a long-term strategy. Once it has served its purpose you will follow up with applications for overnight contact and finally shared residence.

If you are using a contact centre or have been ordered to use one and there is no good reason why contact should be restricted in this way or be supervised the recommendation has to be to stop using it and return to Court with an application for proper contact or shared residence; tell the judge that you think it is entirely inappropriate in your case and that you will not attend.

This is a risky strategy and may mean that you will stop seeing your child for a time but the alternative is a false and unnatural arrangement which cannot foster the relationship between you and your child anyway. The only possible use of contact centres is when the relationship has already broken down entirely, perhaps because the father has been in prison for a long time, or he has finally tracked down an abducted child and the child has little knowledge or memory of the father; they can then be used for a short period to get contact working again.

Any use of a contact centre to reduce contact should be strenuously opposed; this is the view of *Fathers 4 Justice* founder Matt O'Connor:

> *This old chestnut crops up from time to time but for what it's worth I'd never use one again if I found myself in that position.*
>
> *I was forced into using one for 6 months, supervised just because it was the only thing mum would accept.*
>
> *I should never have accepted it as it shifted the status quo of ordinary contact downwards, albeit they say 'for a period of time'. My arse. It is at best a degrading, dehumanising experience.*
>
> *I now see my boys after adopting the risky 'retreat' strategy and have no problems now, but it's down to the individual if they want to use an approach that works if mum is trying to punish you but doesn't if mum is trying to replace you as the father with another man.*
>
> *Re affecting the kids: this doesn't wash. In a contact centre you are losing them anyway. The net effect is the same whatever you do. The risk is losing your kids slowly and painfully or in one swoop.*

5.4.6. Indirect contact

Like welfare, contact itself isn't defined. The word 'otherwise' in Section 8(1) of the Children Act allows for contact to be either 'direct': that is visits, staying overnight, etc., or 'indirect', which means letters, cards and emails only. 'Indirect contact' is a device by which the courts may create the impression that contact is taking place when in fact it is not, or is fatally compromised. Preventing contact entirely is bad for their figures and bad PR; indirect contact offers a way out.

No reasonable person pretends that indirect contact is anything but a sham; in **V v V [2004] EWHC 1215 (Fam)** Mrs Justice Bracewell equated indirect contact with the judge 'giving up' (see below under **Transfer of Residence**).

Indirect contact routinely means, for example, that a parent can send their child no more than one letter a month – which the resident parent need not acknowledge; or even that a parent may receive a photograph of the child every 6 months. That is still classed as 'contact.' Indirect contact isn't mentioned in the Children Act and is a judicial invention described in the *Family Court Bench Book*, a simplified reference guide for judges.

It is an article of faith amongst family judges and CAFCASS that once a parent has been separated from his children for a period of time, there must then be a period of only indirect contact, followed by a period of very slow reintroduction, preferably in a contact centre. This is why it is so important for obstructive parents – and their legal teams – to establish a *status quo* during which there has been no contact. This period does not have to be very long; just a few months will suffice.

This practice is palpably absurd and there is no research-based evidence that it is necessary, or that it results in normal relationships being resumed and protected. Anyone who has ever been away from their children for a long period of time – in hospital, on military service, even in prison – will know that there is absolutely no need to be gradually reintroduced to their children. The children will be delighted and eager to see them, and there will be much hugging and celebration. The concept of gradual reintroduction is only made necessary by the self-serving divorce industry and the alienation of an obstructive parent.

It is vital that you get indirect contact changed to direct contact – even if it is supervised – as soon as you can; otherwise it will remain indirect indefinitely. **Indirect contact provides an ideal breeding ground for parental alienation**.

If you are ordered only indirect contact:

- Never send a letter, always send a postcard to your child. Your child will probably never be allowed to open a letter but they may catch a glimpse of a post card. Always post so that it arrives on a Saturday morning when children are off school and are more likely to see it before the resident parent does.

- Don't write anything which may be contentious or provocative; the resident parent will inevitably object. It may become necessary

for CAFCASS to vet whatever you write. Don't promise contact or anything which can be obstructed or refuted.

- Always send cards by Recorded Delivery; it doesn't guarantee that they will reach your child, but it does ensure that the other parent cannot claim that they have not been sent.
- Send small presents; good presents are not always expensive ones.
- Copy any photographs you send and keep the copies to show to CAFCASS when they see you.
- Stay in close contact with the school, always ensuring that your child knows you are interested in their work and progress, that you see his teacher regularly and that you are so proud of him and the picture he has painted, story she has written, etc. Make sure you attend parent-teacher evenings and are as involved in school events as the Contact Order allows.
- Even when there is no indirect contact happening because the other parent is blocking it, keep sending cards and letters. Sometimes even the most hard-hearted parent keeps them (not necessarily for the right reasons) and the child may find them or be aware of them – it is still a link with the other parent, however tenuous, and proof that the child has not been forgotten or abandoned.
- Talk to someone. Getting things off your chest really helps.

5.4.7. No contact

A relatively rare type of Contact Order is an Order for No Contact which is another invention of the courts not contained in the Children Act. It is unclear whether they are binding both on the resident parent and on the non-resident parent; i.e., whether they order the person with care (PWC) not to allow contact, or order the non-resident parent (NRP) not to seek contact. The rule of thumb is that if the Court wants to bind the PWC it makes an Order for No Contact; if it wants to bind the NRP it makes a Prohibited Steps Order. It can also make both. Orders for No Contact can be made in situations of severe alienation when older children are refusing to see a parent.

5.4.8. Applying for contact

Solicitors (and some McKenzie Friends) usually recommend that excluded parents apply for contact rather than residence on the grounds that it is more likely to be awarded; the problem with that approach is that innocently applying for contact holds the implied request to be treated as a contact parent, a non-resident parent, an absent parent: a second-rate parent. Contact orders are routinely flouted by resident parents, and do not achieve their supposed objective of facilitating or sustaining proper relationships between children and their non-residential parents. Over successive hearings, often over a period of years, the level of contact specified in the orders is steadily eroded.

Moreover, a Contact Order, if it has a warning notice or penal notice attached, which it must have if it is to be enforced, introduces criminality into the Family Court, with the threat of community service, fines or committal. That is hardly the best way to persuade compliance in what is already a conflicted and fraught situation.

Solicitors will frequently respond to a contact application by making a counter application for sole residence. If you are representing yourself they will take advantage of your inexperience by making a late application and '**ambushing**' you in Court (see **Glossary**). It is common for the application to be made after judgement has been given. You must be aware of this and anticipate it, and if you have a Contact Order already use the opportunity to turn it into an order for shared residence.

Once your ex has a Residence Order this imposes additional restraints on you – taking your child out of the country without her consent now becomes a criminal offence, for example – so you must resist this.

Understand that an application for contact means that you and your parenting ability will be put on trial and will come under minute scrutiny. The Court has absolutely no interest in the resident parent's parenting skills and character, no matter how appalling, because it is not their parenting which is in question.

Because the resident parent has normal custody of the child, the Court will also take into account the effect of contact on her, and whether it causes her undue stress; it has no interest on any effect on you of having no contact, because it will not affect the child.

It is difficult to make a Contact Order flexible, and they tend to be overly rigid. If your work is irregular the chances are that sooner or later you won't be able to make an agreed collection. Your children's other parent will then represent this as evidence of your lack of interest in the children and apply to vary the order for reduced contact.

Unless there are very good reasons why a Shared Residence Order is not appropriate in your case you should not be asking for a Contact Order. Even if you think you will have to accept a Contact Order always apply for a Residence Order, with a defined Contact Order as your fall-back position.

Always apply for more than you think you will get. Even if you have contact and it is working well it can be a good idea to apply for an order just to formalise the arrangement, particularly if there have been problems with contact in the past.

By automatically granting the mother resident status you will gain little joy in the courts under the present system. Pursuing a case for defined contact is largely pointless as the courts do not and will not enforce it.

The fundamental position of the courts is that because Contact Orders carry the implied threat of committal they are distressing to mothers and thus are not in the best interests of their children. Even Lord Justice Thorpe has said that unless a father makes an application for residence there is little the courts can do to help him.[257]

[257] In a Court of Appeal case in 2003 Thorpe upheld a ban made in Chelmsford County Court against a father having indirect contact with his daughter on the grounds that it upset the mother; he said that

In order to make an order for contact it is first necessary – fairly obviously – to determine which parent has residence of the child because it is that parent to whom the Contact Order will apply. Whilst it is possible to make orders for shared residence a shared Contact Order 'is a creature unknown to law'. It is not necessary, however, to make a Residence Order so that there can then be a Contact Order; see **Re B (A Child) [2001] EWCA Civ 1968**.

If you are forced to apply for contact rather than residence then keep reading. An order for contact should direct the resident parent to make the child available for contact. The details of the contact ordered by the Court must be defined in a 'schedule of contact'; this is referred to as 'defined contact'. The schedule must be detailed and include when and where the child is to be collected, by whom, how long the child is to stay with you, and when and where the child is to be returned and to whom.

If you turn up to return your child and your children's other parent or whoever you should be returning the child to is not there – perhaps she has sent a friend – you are within your rights not to return the child (though see **Section 3.1.11** on delegating Parental Responsibility). It is important, therefore, that the order makes this clear. The resident parent may object to the schedule of contact, but it can form the basis for negotiation.

It is essential that a Contact Order is written in clear terms, so that both parties are in no doubt how to comply with it and will be aware if they are in breach. Moreover, the order should be in injunctive terms to both parties.

Here are some of the tactics you can use when applying for contact:

- While you wait for court dates and reports, etc., **always request an order for interim contact** to ensure the relationship keeps going (see below). The resident parent may object to this, but if you don't ask you won't get.

- Some parents and McKenzies recommend getting separate representation for your children from a NYAS officer on the grounds that in general they must be less biased than CAFCASS or they would never get work. Our experience of NYAS is not encouraging.

- In addition to interim contact you can seek an interim Residence Order for 2 or 3 months, for example over the school summer holidays.

- Explain that your Parental Responsibility is being abused by the resident parent: that you are receiving no school reports, doctors' reports, access to your children's welfare etc. This should be easy to prove.

- Put the resident parent in an unfavourable light: emphasise that they are thwarting contact for no good reason due to anger, alienation, etc. Again this should be easy to prove if it is true. Cast doubt on the mental state of the resident parent if there is good reason to do so, but be very careful not to overdo this.

the court's only option other than to fine or jail the mother was to transfer residence, but the father hadn't applied for that. Matt O'Connor said, 'This judgment has given the green light to every recalcitrant mother in the country who finds contact upsetting.'

- Use **Section 11(4)(c)** of the 1996 Family Law Act as a legal argument for the presumption of regular contact which is not happening. The downside of it is that it uses weasel phrases like 'regular contact': once a year is regular. The Labour Government intended to repeal this part of the Act, but it still stands at the time of writing.

- Use a McKenzie Friend in Court and appeal all unfavourable decisions.

Contact Orders routinely provide insufficient time with your child, 2 hours every other Saturday is not unusual; even if you manage to get overnight staying contact it may only be every other Saturday night. Reasonable contact will give you the whole weekend, alternate weeks, from Friday afternoon when you pick up your child from school to Monday morning when you return him. You will also have half of all school holidays and substantial contact at half-term; you may even get some mid-week contact.

This level of contact will enable you to meet your child's school friends – and perhaps have them to stay over – and enable you to talk to his teachers; you will need a cooperative employer, though. Anything less than this will make maintaining a meaningful relationship more difficult. Once you have this level of contact there is absolutely no reason why you should not have shared residence.

Remember that you as a parent have no rights. The only person with any legal rights is the child, so don't write in your position statement or say anything in Court that refers to your rights; concentrate on your child's right to have a relationship with both parents, his grandparents, aunts and uncles, etc. State also that your child is missing out on all the activities you used to do with her/him. It is really important that you put things in this way as it makes your application child-focussed and more likely to win the approval of CAFCASS.

Once you have contact established you can try to build on it. If the contact has been working well for, say three months, but is inadequate, return to Court with an application for a more realistic level of contact, or even for a Shared Residence Order (SRO). It is worthwhile indulging in some horse-trading: be prepared to lose a Sunday if it means getting some mid-week contact, for example, or accept some loss of overall time if you can win an SRO instead. The more you ask for, within reason, the more the courts are likely to award.

Be cautious, though; the courts' basic policy on responding to applications for increased contact was established by two CAFCASS staff, Bruce Clark and Brian Kirby: the application triggers an investigation by CAFCASS and a **risk assessment**,

- Where the quality of contact is deemed to be satisfactory there is no need to increase it;

- Where the quality of contact is considered to be poor the recommendation is for no more contact;

- Where the quality of contact is indeterminate the recommendation is for a cessation of contact while the case is deferred.

5.4.9. Model contact order

The average family judge wouldn't qualify as a toilet cleaner in McDonalds. Cleaning toilets requires setting up a schedule which the cleaner must then adhere to, cleaning the toilet at the appropriate time; his supervisor must then ensure that the schedule has been followed and the toilet cleaned to the appropriate standard.

Nothing like this happens in a Family Court; despite the huge number of Contact Orders made – well over a million by 2008 – family judges still do not seem able to draft an order which will be proof against misunderstanding and misinterpretation. The 'typical' arrangement is alternate weekends – collect from school on Friday, return to school on Monday; one Wednesday overnight on the other weeks; half of school holidays; alternating Christmas, New Year, birthdays, etc. The problem with this is that it is made up of several alternating cycles; where these cycles overlap there is room for confusion, particularly with a party determined to be obstructive.

Contact Orders work best when they are flexible and parents are prepared for a bit of give and take. Sometimes, however, it is necessary for them to be written rigidly if you are not to be taken advantage of and there is to be no room for dispute, confusion or discussion. The following is a possible solution which has worked in many situations; the handover times can be changed, but should be appropriate to the age of the child:

IN THE (*Give the name of the Court*) **COURT** **NO. OF MATTERS:** (*Put your case number here*)

IN THE MATTER OF (*Put the full name of your child as it appears on the birth certificate here*) **Born** (*Put your child's date of birth here*)

BETWEEN:

(*If you are the applicant, put your full name here*)

APPLICANT

AND:

(If your children's other parent is the respondent, put her full name here)

RESPONDENT 1

AND:

(Put the name of your child here if he or she is a party to the case)
[Through their NYAS or CAFCASS Guardian or Independent Solicitor]

RESPONDENT 2

O R D E R

BEFORE the Honourable (give the judge's name) sitting in chambers at (give the Court's name and its address) on (put the date of the hearing here).

EITHER, if the parties are representing themselves

UPON HEARING the Applicant (put the name of the applicant here – probably yourself), in Person and the 1st Respondent, (put the name of the 1st Respondent here – probably your ex), in Person and Counsel for the 2nd Respondent Child by her Guardian (put the name of your child's guardian here if appropriate).

ALTERNATIVELY, if the parties are represented

UPON HEARING (Give the name of the applicant's solicitor), for the Applicant, and (Give the name of the 1st respondent's solicitor), for the 1st Respondent, and Counsel for the 2nd Respondent Child by her Guardian (put the name of your child's guardian here if appropriate).

IT IS ORDERED [BY CONSENT(if the order is a Consent Order)**] THAT**

1. STAYING CONTACT IN 2011, 2012 & 2013

The 1st Respondent, (put the name of the 1st respondent here), shall make the child (put the name of your child here), available for Contact with the Applicant, (put the name of the applicant here), for the contact periods and with the collection/return arrangements as set out in Clauses 2 – 8 following.

2. WEEKEND CONTACT

Weekend staying contact to continue in the pattern established for (*give the period of time for which contact has been running*), that is to say, alternate weekends, starting on Friday, (*give the date and month on which contact is to commence*), from 6:00pm on the Friday, through to 4:00pm on the Sunday.

Where the alternate weekends fall within school holiday contact, then the weekends will be absorbed into that extended staying contact and no additional weekends will be given. Thus if an extended period of staying contact ends on a Saturday, and the normal pattern of alternate weekends means that a contact weekend falls the following weekend then contact will continue in that manner.

(1) **Collection:** On the Friday, (*give the relevant adult's name*) will collect (*give your child's name*) from (*give the relevant adult's name*) at (*give the venue for collection*) at 6:00pm.

(2) **Return:** On the Sunday (*give the relevant adult's name*) will return (*give your child's name*) to (*give the venue for collection*) at 4:00pm for collection by (*give the relevant adult's name*).

3. CHRISTMAS CONTACT

Christmas holiday staying contact to continue in the pattern established for (*give the period of time for which Christmas contact has been running*), that is to say contact takes place either for the 1st or 2nd week of the 2-week school holiday so that Christmas Day is spent in alternate years with the Father and Mother respectively. Christmas Day 2011 is to be spent with the Mother/Father (*delete as applicable*).

(1) **Collection:** On a date to be confirmed by both parties no later than 2 months prior to the end of the School Christmas Term (*give the relevant adult's name*) will collect (*give your child's name*) from (*give the relevant adult's name*) at (*give the venue for collection*) at 12 noon.

(2) **Return:** On a date to be confirmed by both parties no later than 2 months prior to end of the School Christmas Term (*give the relevant adult's name*) will return (*give your child's name*) to (*give the venue for collection*) at 12 noon for collection by (*give the relevant adult's name*).

4. EASTER CONTACT

Easter holiday staying contact to continue in the pattern established for (*give the period of time for which Easter contact has been running*), that is to say contact takes place for the 1st week of the 2-week School Easter holiday, Saturday to Saturday.

(1) **Collection:** On the first Saturday of the School Easter Holidays, (*give the relevant adult's name*) will collect (*give your child's name*) from (*give the relevant adult's name*) at (*give the venue for collection*) at 12 noon.

(2) **Return:** On the second Saturday of the School Easter Holidays (*give the relevant adult's name*) will return (*give your child's name*) to (*give the venue for collection*) at 12 noon for collection by (*give the relevant adult's name*).

5. SUMMER HOLIDAY CONTACT

Summer holiday staying contact to continue in the pattern established for (*give the period of time for which Easter contact has been running*), that is to say contact takes place for not less than 3 weeks during the first half of the approximately 6-week school Summer Holiday, starting on the first available Saturday, running Saturday to Saturday.

(1) **Collection:** On the first Saturday of the School Summer Holidays, (*give the relevant adult's name*) will collect (*give your child's name*) from (*give the relevant adult's name*) at (*give the venue for collection*) at 12 noon.

(2) **Return:** On the fourth Saturday of the School Summer Holidays, after 3 weeks of staying contact, (*give the relevant adult's name*) will return (*give your child's name*) to (*give the venue for collection*) at 12 noon for collection by (*give the relevant adult's name*).

5. TELEPHONE CONTACT

The First Respondent (*give the 1st respondent's name*) is to encourage the child (*give your child's name*) to telephone the Applicant Father/Mother (*give the applicant's name*) twice a week.

6. FUTURE CONTACT

The First Respondent (*give the 1st respondent's name*) is to make the child (*give your child's name*) available for contact with the Applicant (*give the applicant's name*) for future contact, as set out above and for any other contact as arranged between the parties.

(1) **School Holiday Timetable:** It is the responsibility of each parent and the child's Guardian to establish the dates of the school holidays and prepare for the future Contact periods in accordance with the pattern of contact as set out *supra*.

(2) **Section 91(14) of the Children Act 1989:** Pursuant to section 91(14) of the Children Act 1989 neither party may make further application in relation to the child without permission of the Court, until (*give the appropriate date here*). Any such application must be made, in writing in the first instance, to (*give the name of the judge*).

7. COSTS

There shall be No Order for Costs, [save that there be detailed assessment of the publicly funded costs of the 2nd Respondent Child by her Guardian – *if appropriate*].

DATED this (*give the day of the month*) day of (*give the month and year*).

5.4.10. Interim contact

The court process is extremely long and drawn out, and getting longer as CAFCASS in particular takes ever longer to assign an officer to prepare whatever report has been directed and to write the report itself. By the time an officer has been appointed and a report given to the Court a year can have passed; don't let this be a year during which you don't see your children.

Every application for contact should be accompanied by an application at the Directions Hearing for interim contact to ensure that your relationship with your children keeps going. Interim contact can be staying or visiting, or may only be indirect, but it is only a temporary measure while you wait for further proceedings. Interim contact ensures that some contact takes place during the slow court process, pending a full hearing. **You are strongly advised always to request interim contact** while you wait for the process to complete or you may not see your child for many months. You should advise the Court and the other side in advance that this is what you intend to do.

The criteria for ordering interim contact were established by Lord Justice Wall in Re D (Contact: Interim Order) [1995] 1 FLR 495,

- Contact must be monitored (usually by CAFCASS);
- The judge must have sufficient information to order contact, even if at the end of proceedings a different order is made;
- If the dispute is only over the amount of contact, an interim order can be made without considering any additional information.

The Court is obliged to process the application and you will get a minimum of a short hearing within a few weeks, giving you the opportunity to explain why your child deserves a relationship with you. Explain that your application is made in order to keep contact going during the inevitable delays introduced by the system and while you wait for CAFCASS reports, etc.

Remind the judge of the delays likely in any contested case and quote the 'no delay' principle (described at **5.2.2**). Emphasise that you are acting in the best interests of your child by ensuring your relationship is not interrupted and that alienation has no chance to develop. Refute any false allegations.

Ask for an amount – or 'quantum' of contact – equivalent to the amount you and your child enjoyed before things went pear-shaped. Understand, though, that the opposing solicitor will challenge your application and ask that the Court waits until the CAFCASS reports are in; this sounds reasonable but is really exploiting the unacceptable delay inherent in the system. If you don't ask you won't get. Your ex's solicitor will encourage the making of allegations which must then be investigated. Understand also that the courts tend to err on the side of caution. Consider Lord Justice Wall's cautious approach in Re D:

> *The greatest care had to be taken in making an interim order and without hearing oral evidence, to ensure that it was in the interests of the child and that the order did not prejudice the issue. It was difficult to envisage circumstances in which an*

> *interim order for contact could properly be made where the principle of contact was genuinely in dispute and where there were substantial factual issues relating to a child which were unresolved without the Court hearing oral evidence or having the advice of an expert such as a court welfare officer.*

Note just how irrational this position is: until the reports are in and the conflict examined the child is presumed to be safe with the respondent and unsafe with the applicant. Until the issues are resolved, insist that the Court treats you and the respondent equally. If no order has been made, you remain equal under the law.

You'll need to keep pressure on the Court: if the principle of interim contact is accepted at the Directions Hearing ask for the earliest possible date for the hearing for interim contact. Show your willingness to attend Court at short notice and accept a cancellation so the matter can be resolved expeditiously. Push the Court to establish a timetable of realistic targets for hearings and make sure they stick to it. All this will wrong-foot your ex who will want to introduce as much delay as possible.

5.4.11. Varying an order

If an order is made with which you disagree and feel unable to comply you should appeal it. If circumstances change and you want to alter the order you should apply for a variation. If you simply disobey it you will be in breach and the other parent can apply for enforcement. You must show the Court what has changed, why it means you cannot obey the order and why it must be changed. Until there is a new order in place the original stands.

Once contact is up and running it is important to increase it periodically – say, every 3 months – to the point where you have a reasonable level. There is no reason then why you should not turn the Contact Order into an order for shared residence. You can either have these periodic increments written into the original order, which means you don't have to return to Court and it is cheaper and easier for everyone, or you can apply to the Court for a variation of the original order. Of course, your ex will also be applying for variations to reduce the level of contact.

You should apply to the Court for a 'variation' of the contact order. Do this using Form C2 if the original order is less than 12 months old, or C100 if it is older than 12 months. Tell the judge how pleased you are that you were granted the order and that it fits with the best interests of the children. Then ask for a variation so that you can pick up the children from their school; say that it will 'assist the other parent'. Cut them out of the equation.

Ask to be allowed to pick your children up from school and to drop them off at the resident parent's home. Get a copy of the order and send it – with the Court's consent – to the school explaining that you have a Court Order, signed by the judge, and that you will be picking up the children on the following dates. Explain that anyone in breach of the Court order is liable for contempt; explain that you don't expect any difficulty and that you are considering the best interests of the children; perhaps you could have a meeting with the headmaster/mistress to discuss these issues.

5.4.12. Making contact work

Once contact has broken down and a Court Order has been applied for and then made the challenge is how to get contact to work again.

The good news is that for most children it is possible to re-establish contact and make it work successfully. These are some of the factors which will affect the outcome:

- The resident parent must understand the value to the child of retaining a relationship with the non-resident parent.
- It is easier to re-establish contact with older children – over 7, say – who have had a good relationship with the contact parent before contact was obstructed.
- The shorter the period of disruption the better. Delay is harmful and will reduce the chances of success.
- Wishes and feelings reports in which the child expresses the desire not to see the absent parent can add delay and lead parents to abandon prematurely the attempt to re-establish contact. While it is important the child feels he has a voice in decisions affecting him, he must also be protected from the burden of responsibility for such influential decisions.
- Ensure handovers do not necessitate the parents having to meet: collection of children from school is best, or you could suggest that hand-overs are conducted by intermediaries so that you and your ex do not need to meet. One possibility is to arrange contact where a trusted relative (such as a grandparent) can be present. This isn't ideal and can be restrictive, but it is better than supervised contact in a contact centre, which might be your only other option.
- If your ex has specific concerns about contact – she doesn't trust your driving, she thinks you drink too much, she doesn't want your child to be taken to see a particular adult or to engage in a particular activity – you can make an **Undertaking** to the Court that you will not do these things. If you break the Undertaking the Court can fine you or imprison you for up to two years.

We also repeat the advice given earlier:

- The needs of the child must be prioritised, and children given a say in how arrangements evolve over time;
- There must be flexibility over arrangements, with supportive and cooperative parenting;
- Children must be able to feel settled and truly at home in both households.

5.5. Residence Orders

5.5.1. Definition

'Residence' is what used to be called 'custody'. According to the Children Act it is a court-ordered arrangement 'settling the arrangements to be made as to the person with whom a child is to live'. **Note**: that 'person' here is singular, and that this wording has caused untold misery, by denying children the right to live with both of their parents. Most residence orders are for 'sole residence', which means the child habitually lives with only one parent and may or may not have 'contact' with the other. Less frequently are orders made for 'shared residence', which means the child is able to live more or less equally with both parents. Until a Residence Order is made both parents theoretically have residence, so an order for residence either confirms this, in cases where one parent seems to have forgotten, or removes the status of residence from one parent.

In exceptional circumstances a court can order residence *against* the wishes of the adult in whose favour the order is made, though it cannot order contact in these circumstances. If you do not already have Parental Responsibility a Residence Order will confer it for the duration of the order only. In the case of an unmarried father the Court must also make a separate Parental Responsibility order (**Section 12** Children Act 1989).

It is important to note that a Residence Order is confined to determining where a child shall have residence, it gives no other powers. We should repeat Lord Justice Ward's observation in Re G (A Child) [2008] EWCA 1468,

> *A Residence Order gives the mother no added right over and above the father. That is the lesson that has not yet been fully learned in the 19 years that the Act has been on the statute book. The Residence Order does no more than its definition allows.*

In 2009 the courts made 28,160 orders for residence, but they do not publish figures to indicate if these are for sole or shared residence.

Like Contact Orders, Residence Orders can come with conditions. In B v B (Residence Order: conditions) [2004] 2 FLR 979, for example, the mother had attempted to prevent contact with the father and had misled him and the Court on a number of serious issues. The Court ruled that moving the child to the geographical area proposed by the mother would necessitate the child taking a flight in order to maintain contact and was not in the interests of the child. Furthermore the mother could not be relied on to promote contact. A Residence Order was made in favour of the mother with a condition that she resided within a defined area in the South East of England.

Note: that the sanctions available to enforce Contact Orders cannot be used to enforce residence. If an order is breached, i.e. a child is not returned, you have to use the Sections 33 and 34 of the Family Law Act 1986 as described in **Chapter 14**. If the Court orders the child to be returned, and attaches a penal notice, breach of the order could then result in committal.

5.5.2. Sole residence

If your children's other parent has applied for a Sole Residence Order you must object to it. If you do not make a residence application in your own right the judge may simply award residence to the other parent by default due to you not filing your application; you will then become a contact parent. You should file for a Shared Residence Order if they persist and enclose evidence of why you should have shared residence; use the case law outlined below. If you then get no cooperation explain to the judge that your only option is to change this to a sole residence application.

Some people, such as the support organisation *Mothers Apart from Their Children* (MATCH), [258] claim that more fathers are being awarded sole residence and that more mothers are being excluded from their children's lives as a result. It's impossible to verify this because the figures simply aren't recorded any more by the courts, although CSA statistics on resident parents seem to contradict the claim. A number of press articles have highlighted the plight of these mothers.[259]

What seems to be happening is that these are cases in which the mother is the main wage earner before separation and the father stays at home as 'primary carer'; this type of domestic arrangement is certainly more common than it was. When such couples separate the courts are sometimes awarding custody to the 'primary carer', who in these cases will be the father.

The usual precedent is Lord Justice Thorpe's anachronistic and bigoted ruling in **Re S (Children) [2002] EWCA Civ 583**, in which he condemned mothers who pursue a career and awarded sole custody to a mother who probably would have benefited more from a shared arrangement, partly, it seems, in order to curtail her career and tie her to her home. The old prejudices are still thriving: that there can only be one carer in a child's life (see **Introduction**), that one parent must care and the other must pay, and thus mothers now find themselves the victims of the injustice as well as fathers. That is yet another indictment of the prejudices and inability to deal appropriately with family breakdown which are endemic in the Family Courts.

The court system is an adversarial one of winners and losers in which the winners take all. In order to 'win' residence therefore the system obliges each parent to make the other look as bad as possible. In effect you are forced to play their own game. Change of residence from mother to father demands the presentation of incontrovertible proof that the mother is unfit; maintaining the *status quo*, on the other hand, requires no such evidence from the mother. Judges seem to have some romantic notion that they are chivalrously protecting damsels in distress from violent men.

Preventing a child from having a relationship with one parent should normally be taken as evidence of pathology, and yet it is clear from

[258] http://www.matchmothers.org

[259] For example Catherine Bruton, *Mum doesn't live with us anymore*, The Times, 03 June 2008, http://women.timesonline.co.uk/tol/life_and_style/women/families/article4052406.ece and Sadie Nicholas, *Why more and more women are losing custody battles over their children*, The Daily Mail, 05 June 2008, http://www.dailymail.co.uk/femail/article-1024304/Why-more-women-losing-custody-battles-children.html

the number of non-resident parents who obtain psychiatric reports on their former partners only to find them wholly ignored that mental or physical abuse of the child by the resident parent will not be considered or acknowledged as a factor. No reasonable person could ever condone the removal of either parent from a child's life, however there are situations in which trying to obtain sole residence is the only course of action left for a non-resident parent. It is essential that he then allows the other parent contact. In the face of unreasonable behaviour you must appear reasonable at all times.

5.5.3. Shared residence

Shared Residence Orders are enabled by Section 11(4) of the Children Act and allow both parents to play an important role in their child's life. In a Contact Order, times, durations and conditions of contact are controlled by the parent with the Residence Order: the resident parent. We would advise that your starting point should be an application for a Shared Residence Order (SRO) in which responsibility is shared and parents are supposed to be treated equally.

Shared residence rarely represents an equal division of a child's time, that is not the point, which is more symbolic. Wresting shared residence from a parent who is determined not to relinquish their position of sole residence is a significant achievement.

In **Re AR (A Child: Relocation) [2010] EWHC 1346 (Fam)** Mr Justice Mostyn said,

> *I am clearly of the view that a joint or Shared Residence Order should be made. Indeed, such an order is nowadays the rule rather than the exception even where the quantum of care undertaken by each parent is decidedly unequal. There is very good reason why such orders should be normative for they avoid the psychological baggage of right, power and control that attends a sole Residence Order, which was the one of the reasons that we were ridden* [sic] *of the notions of custody and care and control by the Act of 1989.*

If you are in receipt of an SRO you are a resident and not a non-resident parent and doctors, schools, the education authority, local health authority, etc., should accept you as your child's parent. You don't have to ask permission of your children's other parent to take your child abroad, and if you are a bit late returning your child to the other parent, you shouldn't be accused of abduction. If your child's other parent has appointed a guardian to look after your child (aunt, grandparents etc.) and she dies whilst your child is in her care, if you are a non-resident parent the child will not automatically come to you and you would have to fight this out in Court; with an SRO your child will come to live with you as you are the surviving resident parent.

Some argue that the additional litigation necessary if you are to turn working contact into shared residence isn't justified: what name you give your relationship with your child is immaterial. It depends very much on the individual case, but remember that it is the law itself which creates these inequalities and then forces parents to fight them.

The conventional sole-residence-plus-contact scenario is deeply unsound and doesn't work. Giving one parent an artificial status above the other leads to conflict and often to the total exclusion of the 'inferior' parent from the child's life. Article 18 of the United Nations Convention on the Rights of the Child demands, 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child'.[260]

Moreover children themselves say they want equal time with both of their parents, and even when parenting time is not absolutely equal children experience better outcomes from some form of shared parenting. Unfortunately society is now run by those who view 'fatherhood as an anachronism and a stubborn obstacle to their utopian vision of the social welfare state.'[261]

The arguments for Shared Parenting which have been successfully used in UK courts are that it,

- ensures the continuation of the child's family life, with nurture from both parents rather than just one, and from two extended families;
- reassures the child he still has two parents, and that though they now live in separate houses, he has a home in both;
- counters the disgraceful lie that only one parent is 'caring' while the other is 'deadbeat' or 'absent';
- ensures that the responsibility of discipline doesn't fall only to one parent while the other is relegated to being the 'fun' parent;
- ensures that children and parents develop meaningful and lasting relationships, instead of the artificiality and stigma of 'contact';
- convinces the parents that they both have an enduring role in their child's life;
- encourages parents to work together and support each other in their parenting – this principle was established in **Re F (Shared Residence Order) [2003] EWCA Civ 592**, [2003] 2 FLR 397;
- places both parents on an equal footing with schools, doctors and other agencies, which might otherwise only be prepared to deal with the 'resident' parent;
- gives both parents the right to take their child on holiday;
- affirms that no matter what, each parent wants to, and is able to, provide a home for their child;
- and reassures the child that in the event of one parent dying he still has a home to go to.

[260] http://www2.ohchr.org/english/law/crc.htm
[261] Carey Roberts, *Fathers no longer cost-effective*, http://www.ifeminists.net/e107_plugins/content/content.php?content.52

5.5.4. Joint residence

This arrangement describes an order awarding residence to a biological parent and their partner living in the same home. Such orders are not really necessary, and if the other parent is surviving and excluded, they can be provocative.

5.5.5. Making your application

First of all, read the section in **Chapter 1** on overcoming the traditional objections to shared parenting, then read the notes above on asking for a Contact Order. Much that applies to contact applications also applies to residence. Before you apply for an order for shared residence you should consider the following:

- How far away from your children's other parent do you live?
- Has she/he made any false allegations about you?
- (If you are the father) do you know whether your children's mother is still breastfeeding?
- Do you work flexibly enough to be able to have your child stay overnight and some full days during the week?
- Are you likely to be away from home for weeks or months at a time?
- Do you have the ability to cook for your children and show them how loved they are?
- If you have nowhere to live yourself – and many fathers haven't – you may have to accept contact in a contact centre.

An application for residence is likely to involve CAFCASS. They will want to see if you have suitable accommodation for your children, who will care for them when you are at work, whether your new partner is suitable, etc. They will visit your home, interview relevant parties and carry out background checks.

Start thinking of reasons why your child deserves to have you in their life; make sure you have read **Section 6.1.6** about parenting plans; contact the Court and ask them to send you out one of their parenting plan booklets.

Look at the cases above where shared residence has been granted and emphasise these points to the Court in your case; here are some of the key points which emerge;

- Shared residence must be shown to be in the best interests of the child;
- Shared residence is more likely to be ordered where parents live close to each other;
- Shared residence shows that each parent, and the home offered by them, is of equal status;

- Shared residence tells parents that they have equal duties and responsibilities;

- Shared residence prevents one parent trying to control the other.

Document all the time your child has spent with you; use an Excel spread-sheet to show every day – and especially nights – your child has been resident with you. You could use one row for each day and 4 columns for mornings, afternoons, evenings and overnight stays. Colour-code the cells show clearly the range and extent of the times when your child has been in your care.

You are aiming to establish evidence you can present to the judge showing you are competent to care for your child, you are supportive of the relationship between your child and the mother, that you have made every effort to make a shared arrangement work and that your ex is now seeking to disrupt this, to the detriment of your child's best interests. You must show how involved you are with every aspect of your child's life, and become a paragon of fatherhood.

You want the shared arrangement reinstated because divergence from it is injurious to your child's welfare and violates his right to his family life as well as impacting on his social and psychological development. Demonstrate as well the harm done to your child's education; show how involved you have been with his homework, and use research to prove the link between father involvement and educational success.

Do not put up with being merely a McDad; demand to be a proper, involved and committed father. The prejudices of the Court, of CAFCASS, of schools, doctors, and other agencies will be against you, and you will have to be proactive, work very hard indeed, and assert your rights and your child's rights at every opportunity, but the rewards make it worthwhile.

If you have applied for shared residence you must never again mention the word 'contact' or get into any discussion with anybody about contact. This is one of the tricks played to push you into accepting contact rather than shared residence. If someone uses the word in conversation, always reply using the term 'shared residence' instead. If your ex or their solicitor uses the word 'contact' in their correspondence, always write back with it changed to 'shared residence'. Maintain this position throughout proceedings, especially in Court, no matter what a judge says, always respond in terms of 'shared residence'. Beware in Court of judges who use legally meaningless terms such as 'shared parenting' – always use the term 'shared residence'.

5.5.6. When not to apply

Don't ask for a Residence Order unless you have somewhere where your children can stay overnight with you in separate beds. Don't apply if there has been a long period of time since you last saw your child or if you have allowed a long period to elapse before making your application. You can always make a further application for shared residence once you have re-established contact and it is working well.

5.5.7. Transfer of residence

The only logical response of a court to a parent who has consistently shown their inability to support the relationship between their child and the other parent and refused to comply with every order the Court has made is to transfer residence to the non-resident parent who is better able to provide for the child's emotional needs. In **V v V [2004] EWHC 1215 (Fam)** Mrs Justice Bracewell lamented the

> *intractable contact disputes which drag on for years with little or anything to show for the outcome except numerous court hearings, misery for the parents, who become more entrenched in their positions, wasted court resources, and above all serious emotional damage to the children.*
>
> *Frequently it is the mother caring for the children who is against making contact work. I find she has undermined contact to father over a period of years in circumstances in which the children love their father, want to spend time with him, know him and need a good relationship with him. They also love their mother who, in many respects, is a good parent.*

Bracewell outlined the difficulties for the Court in what has become a defining narrative,

> *Enforcement of Contact Orders creates insuperable problems for the courts. Currently, there are only four options available to the Court and each is unsatisfactory:*
>
> *One, send the parent who refuses or frustrates contact to prison, or make a suspended order of imprisonment. This option may well not achieve the object of reinstating contact. The child may blame the parent who applied to commit the carer to prison. The child's life may be disrupted if there is no one capable of or willing to care for the child when the parent is in prison. It cannot be anything other than emotionally damaging for a child to be suddenly removed into foster care by social services from a parent, usually a mother, who in all respects except contact is a good parent.*
>
> *Two, impose a fine on the parent. This option is rarely possible because it is not consistent with welfare of a child to deprive a parent on a limited budget.*
>
> *Three, transfer residence. This option is not necessarily available to the court, because the other parent may not have the facilities or capacity to care for the child full-time, and may not even know the child. The current case is one in which this is a real option.*
>
> *Four, give up. Make either an order for indirect contact or no order at all. This is the worst option of all and sometimes the only one available.*

Perhaps reluctantly Bracewell chose to transfer residence; as she noted, this option is not ideal, because now the unfortunate child is cut off from the mother instead of from the father; the hope is that whereas the first parent was implacably opposed to contact the second will allow it, and the child will have satisfactory relations with

both parents restored. Transfer of residence is nevertheless preferable to committal or simply giving up.

Though an application for a Residence Order may not always prove successful, you are right to make such an application. By doing so you emphasise to the Court what *should* happen, and join in the effort to apply pressure on the system to change. In protracted cases it is *the only logical response*: if the resident parent cannot put the child's welfare first by supporting its relationship with both parents then residence *must* change. Remind the Court of its responsibility to protect the child's relationship with *both* parents. Emphasise to the Court that the only realistic alternative is committal, which is not in the best interests of the child and will not do anything for your relationship with your child; push the Court to agree with this logic, and it will then have little rational option but to make the order.

These are the conditions with which you need to comply if your application is to be successful:

- the resident parent must have demonstrated implacable hostility to contact, every possible effort has been made to make contact work and they have all failed;
- the non-resident parent is at risk of becoming marginalised;
- the child is at risk of developing psychological problems;
- the resident parent is incapable of any insight into their behaviour and cannot see the harm it is doing to the child;
- the non-resident parent is able to supply all the child's needs;
- the non-resident parent will actively promote contact between the child and the other parent;
- if it is appropriate in your case, emphasise that the resident parent has a personality disorder which renders them unable to accept contact taking place with the other parent, and that their psychological problem is likely to harm the child. If there has been any other form of abuse – which is likely in these cases, include that in your argument too.

5.5.8. Precedents for transfer

There has been a number of notable cases involving transfer of residence. The first case shows an attempt to transfer residence which failed, not least because of the Court's inability to assess adequately the welfare of the children. In **Re H (Children) [2007] EWCA Civ 529**, the Court of Appeal considered a case where the parents had contested residence and each had made allegations against the other. The judge found that none of the allegations against either parent had been proved and ordered that the two children were to reside with the mother, with the father having contact on alternate weekends.

When the father came to collect the children for one of the contact sessions, the elder child was unwell with an abscess; the mother asked the father to let the child remain at home, but the father insisted on taking her away. The child's condition worsened during the day, and

the father took the child to hospital, where she was treated as a medical emergency. The father refused to return the children to the mother on the basis that the mother was neglecting them. The judge considered that the father's allegations of neglect were unfounded, but that the children should remain with him on an interim basis.

The mother's subsequent appeal was allowed. There had been no compelling reason for the change of residence from the mother to the father. The judge had failed to apply the principle set out in Re K (Interim Residence Order) [2004] All ER (D) 276 (Dec) that an interim change of residence could only be justified if it was in the interests of the child, or that there was an emergency that required intervention.

In **Re A (Residence Order) [2007] EWCA Civ 899** in June 2007 the Court dismissed a mother's appeal against the transfer of residence of an 8-year-old child from herself to the father. According to the judge the mother was very hostile towards contact, and interfered with and frustrated the father's contact sessions over a long period. Eventually, the father issued an application for a transfer of residence rather than apply for committal.

A psychological assessment of the mother suggested that she was suffering from a personality disorder, and that her dispute with the father would eventually lead to psychological problems for the child. The report also stated that the mother was incapable of reforming her behaviour, into which she had no insight. The independent social worker indicated the assessment had led him to conclude the child should live with the father, and that, notwithstanding the child's excellent relationship with the mother, by reference to the mother's actions the mother was incapable of parenting the child sufficiently well. The judge considered that the mother was a good mother, but that in relation to contact her behaviour was appalling, and that the father was a good father who could provide for the child's needs. The judge concluded that the child should live with the father, as that would be in his best long-term interests.

The mother appealed and the Court dismissed her appeal, noting that expert evidence from two sources had made strong recommendations that it was in the child's best interests his residence be changed. Evidence of the mother's good parenting had been taken into account; it was not enough for the mother to complain that it had not been given sufficient weight. Although the child wanted to live with the mother, the child's long-term interests outweighed the short-term problems he would face in making the move. The judge had presided over the case for more than two years and had had a good opportunity to engage in the problems surrounding contact and there was no ground upon which the decision could be interfered with. This case shows the sort of evidence and history needed if an application for transfer is to be successful.

In **Re C (Residence Order) [2007] EWCA Civ 866**, in July 2007 the Court of Appeal considered the case of a five year old child who had lived all her life with her mother. The mother had refused contact between the child and the father since October 2003, which had resulted in the father becoming a 'virtual stranger' to the child. Following, *inter alia*, V v V [2004] EWHC 1215 (Fam), [2004] 2 FLR 851 and Re A [2007] All ER (D) 156 (Jun) the judge made an order for the transfer of residence of the child from the mother to the father.

The mother's appeal against the decision was dismissed and the matter was remitted back to the Court for ancillary orders relating to contact, therapy for the child and family assistance. The Court of Appeal stressed the importance of courts acting robustly in cases of failing and/or failed contact. Lord Justice Ward proclaimed,

> *As to the option to make no order, that was the option of abdication and all too frequently judges are driven to that conclusion and that is why week after week fathers come to this court protesting that the Court is powerless to enforce its orders, quite unable to control the intractable, implacably hostile mother, even though the long-term damage to the child is perfectly obvious. Time after time this court has to mollify the angry father, endeavouring to explain that the judge has a broad discretion and that his decision cannot be challenged unless plainly wrong. This time the boot is on the other foot, and if a different conclusion has been reached in this case then let it be shouted out from the roof-tops.*

In May 2008 a mother appealed the Court's decision to send her 3 younger children to live with their father. The fourth, eldest, child had already left to live with him after being assaulted by the mother. The Court considered that the mother was neglecting the children and that a series of new partners was impacting on them adversely; a transfer of residence would be disruptive but necessary. The Court of Appeal upheld the decision – Re S and Others (Residence) (Court of Appeal; Thorpe, Wall and Stanley Burnton LJJ; 13 May 2008).

Transfer of residence is enormously controversial and provokes strong reactions from those who think mothers should always be given residence regardless of their behaviour. The courts will transfer residence only if the risk of doing so is outweighed by the risk of not doing so: long-term emotional harm must exceed short-term distress. In **Re A (Children) [2009] EWCA Civ 1141** Lord Justice Thorpe allowed an appeal against transfer to the father because the risk of the mother frustrating contact did not outweigh the risk to the children of transfer,

> *The transfer of residence from the obdurate primary carer to the parent frustrated in pursuit of contact is a judicial weapon of last resort. There was hardly a need for a psychologist to establish the risks of moving these girls from mother to father……. The risks of gamesmanship from the mother in the future, confirmed in residence but nailed down with a clear detailed Contact Order, were plainly less, and from that essential risk balance the judge was diverted.*
>
> *There is the risk, in my judgment, that a sole Residence Order in Mr. A's favour is likely to be misinterpreted. Mr. A has already given a strong indication that this is the case. Whilst, as I have already indicated, I regard him as an honourable man, and one who will implement the 50-50 living arrangement, I have no doubt at all that he wishes to be in control.*

The arguments for and against transfer of residence are often delicately balanced, and we do not in general support the making of orders for sole residence. Shared Residence Orders do not diminish the parenting role of the parent who previously had sole residence, but transfer of residence does. If you seek transfer of residence it is instructive to consider Bond's train of reasoning in Re R,

To remove a child from his mother in any circumstances is a very serious step. R has lived with his mother all his life. The effect of a decision to change residence upon the mother will be severe. R will be aware of that. I pause to ask myself if the proposed course of action is really in R's overall welfare. I ask myself if Dr. M can be fairly be described as dogmatic in the way that Miss H [mother's counsel] *submits. His evidence was firm and compelling but I did not see it as unreasoned or blinkered. I ask myself if the Guardian has sufficiently analysed Dr M's advice in her global consideration of the case before she came to her conclusion. The guardian has made a careful study of the lengthy history of the case before the current set of proceedings. She would be delighted if she felt that a Shared Residence Order between the parents with proper contact by R with his father would work. The guardian does not believe that R is truly reporting what occurs during contact with his father. She is of the opinion that such an order would cause an end to contact with the paternal family. I disagree with the guardian when she says that solution is clear. I think that it is finely balanced but having said that I accept the guardian's overall analysis.*

5.5.9. Birds nest custody

It is worth mentioning in passing here a shared parenting arrangement gaining popularity in the US and Canada known as 'birds nest custody'.

In this model the children remain in one home, while the parents alternate between their own homes and that of the children. The arrangement is expensive as it normally requires three properties, though it could theoretically be achieved with only two.

In the Toronto case of Abankwa-Harris v Harris a couple remained in the matrimonial home after separation. A joint custody arrangement was broadly agree but there were some outstanding details. Frustrated by the delay, the mother removed the children to an unknown destination and denied the father all contact, making false allegations against him. The Honourable Madam Justice C. Gilmore ordered an arrangement (a 'nesting' order) whereby the parents took weekly turns moving into their home, signalling that the Court would not tolerate unilateral action of this sort without a Court Order.

The pattern, which originated in the Virginia case of Lamont v Lamont, relies on the questionable assumption that children suffer from being moved between two homes; it now seems that any harm children suffer from divorce is not the result of having two homes. It is probably the case that the disadvantages of birds nest custody outweigh the advantages.

5.6. Family Assistance Orders

Family Assistance Orders are relatively rare orders (563 in 2007-08) made by the Court under Section 16 of the Children Act 1989 to give short-term specialist help from CAFCASS or social services to

families caught up in family breakdown. They are made only in circumstances such as,

- A major change in a child's circumstances;
- When contact begins again after a long period of denial;
- When agreements cannot be reached by parents.

Their purpose is to promote the continuation of a child's relationships with both parents, and to prevent alienation; they might be used, for example, to allow CAFCASS a period of time to monitor a situation before making a recommendation on the final order.

Be aware, however, that CAFCASS has also been known to misuse FAOs in order to prevent contact. In one case it used the order as an opportunity to persuade the father to write farewell letters to his daughters. This is very far from the original intention behind them. Local authorities are reluctant to use Family Assistance Orders in contact cases because of the extra cost to them.

CAFCASS must first carry out an assessment and recommend to the Court that such an order is necessary and practical.

Before making the order the Court must allow the parties to comment on the CAFCASS recommendation. The order cannot be made without their consent.

There was originally a requirement that the circumstances under which an FAO was made be exceptional, but this has been removed.

A Family Assistance Order may not remain in force for longer than 12 months.

5.7. Grandparents

The role of grandparents, who are also victims of family break-ups, is frequently overlooked. Many believe that grandparents should be given a legal presumption to contact with their grandchildren in acknowledgement of the importance of grandparents at the heart of the family and of the benefits they can provide to parents coping with a growing family.[262] Grandparents currently provide childcare worth more than £1 billion a year.

When a grandchild expresses a wish not to see their grandparent any more it can be terribly hurtful and can make some grandparents who perhaps don't understand what is going on very angry. Don't be angry; do not reject your grandchildren or disown them. They are being alienated against you just as they are being alienated against their parent; to become angry with them is to be drawn into the trap which has been set for you.

As a grandparent you have no formal legal right to contact with your grandchildren, though you can apply for 'leave' (permission) from the Court to make a Section 8 application if, for example, your own son or

[262] See, for instance, the campaign run by Grandparents Apart, http://www.grandparentsapart.co.uk/

daughter is preventing you from seeing your grandchildren; normally your contact with your grandchildren would be expected by the Court to come out of the parent's contact.

When courts allow grandparents contact they usually order that their contact and the parent's contact run concurrently; obviously if the parent is getting minimal contact that will affect the grandparent, so it is worthwhile applying for separate contact, bearing in mind that the Court may suspect you of trying to win extra contact for your son or daughter through the back door. If you do decide to pursue an application you will have to accept that it will be an unpleasant, prolonged and stressful experience with the usual pattern of false allegations and delay.

Very often the best thing you can do is to support your son or daughter's application for residence or contact and give them all the emotional support and love that you can at what is a terribly traumatic time for all of your family. If you can, also provide practical and financial support.

The application for leave is made on **Form C2**; guidance on completing it is given at **Section 6.2.6**.

Under **Section 10(9)** of the Children Act the Court must consider:

- the nature of your application;
- your connection with the child;
- any risk that the application may disrupt the child's life to the extent that harm is caused, and;
- where the child is in local authority care, the authority's plans for the child's future and the wishes and feelings of the parents.

To support your application you will need to think about these points and prepare answers to them.

If court proceedings are already ongoing in respect of the child you can request, at Question 6, to be made a party to them.

If there are no ongoing proceedings and you are granted leave to make an application you must then complete **Form C100**; guidance on completing it is given at **Section 6.2.4**. At Question 3 you must give details of both parents, and at Question 7 detail whether you want an order for contact or for residence.

At some stage in the process you may be interviewed by a CAFCASS case worker. You will need to present your family as close-knit and normal, and your child as a loving and committed parent. Emphasise the close bonds between yourself and your children and your involvement in the lives of your grandchildren.

To support your application for leave you can use the case **Re J (A Child) (Leave to issue application for residence order) [2002] EWCA Civ 1346** as a precedent. The mother was a psychiatric in-patient and the local authority wanted to place her 18-month-old daughter for adoption. An older child had largely been raised by the

paternal grandparents and to a lesser extent by the maternal grandmother and was about to go to university.

The LA had rejected the grandmother as a possible carer due to her volatile relationship with her daughter and her age, 59. It said the application did not merit judicial consideration. Nevertheless the grandmother applied to be joined as a party and for leave to apply for residence; the mother supported the application as had the father prior to the LA's objection.

The lower court had not adequately considered the Section 10(9) checklist; the question for the Court was 'has the applicant satisfied the Court that he or she has a good arguable case for the criteria that Parliament applied in section 10(9)?' The Court allowed the application, accorded the grandmother party status and allowed her to make an application for residence.

You can also use Re H (Children) [2003] EWCA Civ 369 in which a grandmother was given leave to apply for residence and be a party to care proceedings because she was the child's only relative able to offer care.

There are situations in which a grandparent will wish to apply for residence of a child. Social services – and therefore CAFCASS – are constitutionally opposed to this, believing, no doubt, that a grandparent given residence will use it to enable an excluded child to have contact. The courts, however, are supposed to favour grandparents – and other relatives – over strangers; see **Section 16.1.2**.

There are two precedents from 2009 which you can use for residence. The first is **Re C (A Child) [2009] EWCA Civ 72** in which a CAFCASS guardian appealed against a decision to place a five-year-old child with his 70-year-old paternal grandmother rather than send him for adoption. The appeal was dismissed because,

- The law was biased in favour of placements with the child's wider family;
- The grandmother had demonstrated her commitment to the child and had a good relationship with him; and
- The grandmother wanted to promote continuing contact between the child and his half-sister with whom he had spent his life.

The second precedent was the first case to be reported from the new Supreme Court, Re B (A Child) [2009] UKSC 5.[263] This case overturned a decision from the Court of Appeal, **Re B (A Child) [2009] EWCA Civ 545**, which itself had reversed a decision of the Family Proceedings Court in the grandmother's favour. The case confirmed residence of a four-year-old boy with his grandmother rather than transfer of residence to his father.

The grandmother had been the primary carer for most of the boy's life, while the father had been imprisoned for racially-aggravated assault. The FPC ruling had not been 'plainly wrong' and the Court of Appeal had erred in overturning it; it had also misinterpreted Re G [2006] UKHL 43: biological parenthood was a contributor to a child's

[263] http://www.bailii.org/uk/cases/UKSC/2009/5.html

welfare but there was no presumption in its favour and the child's welfare remained the paramount consideration. The boy's current stability depended on the bond with his grandmother.

Many grandparents are their grandchildren's primary carers but haven't formalised the relationship and find that they have difficulties with schools and medical authorities, etc.

Although you do not have Parental Responsibility (PR) we advise you to apply for a Residence Order which will then confer PR automatically and place you in a much stronger position with regard to schools and doctors. If the Court refuses, using the no-order principle of the Children Act, refer to B v B (A Minor) (Residence Order) [1992] 2 FLR 327 which showed such an order to be in the child's best interests.

5.8. Siblings

Sometimes a father is being denied contact with a younger child but has older children who have chosen to live with him.

If you are a child in this situation, unable to see your younger brother or sister, you have two options. You can make your own application for contact, or you can apply to the Court to be joined as a party to your father's application.

Your advantage is that as a child you will be eligible for legal aid and you can instruct your own solicitor. Read our advice in **Chapter 11** and use Mabon v Mabon as a precedent.

5.9. Cases

Best interests of the child

F v Leeds City Council [1994] 2 FLR 60

Delay

C v Solihull MBC [1993] 1 FLR 290, [1992] 2 FCR 341
Re B (A Minor) (Contact) (Interim Order) [1994] 2 FLR 269
Re D (Contact: Interim Order) [1995] 1 FLR 495
Re J (Children) (Ex parte orders) [1997] 1FLR 606
Re S (A Child) (Family Division: without notice orders) [2000] 1FLR 308

Prohibited Steps Orders

H (minors) (Prohibited Steps Order), Re [1995] 1 FLR 638; [1995] 2 FCR 547; [1995] 1 WLR 667; [1995] 4 All ER 110 CA

Contact

Re KD (A Minor) (Access: Principles) [1988] AC 806 (HL)
Re S (Minors: Access) [1990] 2 FLR 166
Re H (Minors) (Access) [1992] 1 FLR 148
Re F (Minors) (Contact: Mother's Anxiety) [1993] 2 FLR
Re R (A Minor) (Contact) [1993] 2 FLR 762
Re J (A Minor) (Contact) [1994] 1 FLR 729
Re M (A Minor) (Contact: Conditions) [1994] 1 FLR 272
Re P (A Minor) (Contact) [1994] 2 FLR 374
Re F (Contact: Restraint Order) [1995] 1 FLR 956
Re D (Contact: Reasons for Refusal) [1997] 2 FLR 48
Re C & V (Contact: Parental Responsibility) [1998] 1 FLR 392
Re M (Contact: Supervision) [1998] 1 FLR 727
Re P (Minors) (Contact: Discretion) [1998] 2 LFLR 696
Chalmers v Johns [1999] 1 FLR 392
Re K (Contact) (Mother's Anxiety) [1999] 2 FLR 703
Re L (A Child) (Contact: Domestic Violence) [2000] 2 FCR 404
Lau v DPP [2000] 1 FLR 799
Re B (A Child) [2001] EWCA Civ 1968

R v Hills [2001] 1 FLR 580
Re J [2003] EWHC 199 (Fam)
Re D [2004] EWHC 727 (Fam)
Re O [2005] EWCA Civ 573
Re SC (Abduction: Residence and Contact) [2005] EWHC 2205
Re C (A Child) [2006] EWCA Civ 235
Re C (A Child) and XYZ County Council and E.C. [2007] EWCA Civ 1206
Re G (A Child) [2008] EWCA Civ 1468
Grubb v Grubb [2009] EWCA Civ 976
Re L-W (Children) sub nom CPL v (1) CH-W (2) ML-W (3) EL-W (by their Guardian) [2010] EWCA Civ 1253 (CA)
Re S (A Child) [2010] EWHC 192
Re S (A Child) [2010] EWCA Civ 705

Ex-parte applications

Re J (Children) (Ex parte orders) [1997] 1FLR 606
Re S (A Child) (Family Division: without notice orders) [2000] 1FLR 308

Residence

Re H (A Minor) (Shared Residence) [1994] 1 FLR 717
Re K (Residence Order: securing contact) [1999] 1 FLR 583
D v D (Shared Residence Order) [2001] 1 FLR 495
Re S (Children) [2002] EWCA Civ 583
Re A (Shared Residence) [2002] 1 FCR 177
Re A (Children) (Shared Residence) [2003] 3 FCR 656
Re F (Shared Residence Order) [2003] EWCA Civ 592, [2003] 2 FLR 397
A v A (Shared Residence) [2004] 1 FLR 1195
B v B (Residence Order: conditions) [2004] 2 FLR 979
Re P (Children) [2006] 1 FCR 309
Re W (A Child) [2009] EWCA Civ 370
Re B (A Child) [2009] UKSC 5
Re AR (A Child: Relocation) [2010] EWHC 1346 (Fam)

Transfer of residence

V v V [2004] EWHC 1215 (Fam), [2004] 2 FLR 851
Re K (Interim Residence Order) [2004] All ER (D) 276 (Dec)

Re H (Children) [2007] EWCA Civ 529
Re C (Residence Order) [2007] EWCA Civ 866
Re A [2007] All ER (D) 156 (Jun)
Re A (Residence Order) [2007] EWCA Civ 899
Re S and Others (Residence) (Court of Appeal; Thorpe, Wall and Stanley Burnton LJJ; 13 May 2008)
Re R (A Child) [2009] EWHC B38 (Fam)
Re A (Children) [2009] EWCA Civ 1141

Grandparents

Re S (Contact: Grandparents) [1996] 1 FLR 158
Re J (A Child) (Leave to issue application for residence order) [2002] EWCA Civ 1346
Re H (Children) [2003] EWCA Civ 369
Re C (A Child) [2009] EWCA Civ 72
Re B (A Child) [2009] EWCA Civ 545
Re B (A Child) [2009] UKSC 5

CHAPTER 6: PREPARATION

Suffer any wrong that can be done you, rather than come here!

Charles Dickens[264]

6.1. Getting Organised

6.1.1. IMPORTANT

Many fathers seem to be unaware of this so it is important to establish the point early on.

If there is no order in place for contact or for residence then both parents have equal status.

Just because your wife has left with the children doesn't mean she has any more rights over them than you. Many fathers allow a situation to develop in which they become the 'contact' parent by default while accepting the other as the 'resident' parent, just as if there were a formal order in place for contact. Only if the Court orders it do you become a second-rate contact parent, otherwise you have the same parental rights and authority as the other parent. It is vital to make this distinction between an informal arrangement and a formal, court-imposed one.

[264] Charles Dickens, the warning of the Court of Chancery, *Bleak House*, 1853

It isn't only fathers who make this false assumption. If your child habitually resides with the other parent and you effectively only have contact, other agencies such as schools and social services will behave as if the mother has a formal Residence Order and you have a Contact Order. The fact that you have Parental Responsibility will count for nothing with these people. You must emphasise to them that you have equal legal status. This also applies if you have shared residence.

Too many fathers lose contact and lose their cases because they wait for the other parent to make the first step and they react. They are reluctant to take control of their case and leave it for their solicitors to fight on their behalf. They hold back from making any allegations, however true, when the other parent is cheerfully making false allegations. In short, they are too nice.

Don't rely on solicitors; they don't love your children as you do. Take your gloves off. You must take control, be proactive and fight to win.

6.1.2. Some good advice

If it is at all possible, maintain the lines of communication with your children. Get them a mobile phone so you can ring them when you want without having to go through their other parent. Listen to them. Put a plan together so they can meet you in secret after school and pretend that they visited friends instead of seeing you. Make every second you spend with them count to make up for the periods your children are forced to reside in custody – sorry, in the resident parent's home. Extend your time with them by pretending that due to heavy traffic you are going to be half an hour late returning them.

Think of your children as being on a gap year holiday. They are not able to be with you at present but they will be when they get back. They may not call or write but they still know you love them. Plan for the time when the children reach 16 and can walk away from the abusive parent; add to your file so that you can show them how hard you fought to see them and give it to them on their birthday.

Let them express their fears, concerns and hurts. Reassure them as much as you can. Prepare for your time with them. Plan activities; preferably ones which require lots of interaction and which their other parent won't do. Don't go to the cinema if your time is limited; sitting in silence in the dark is poor use of these precious hours.

Stock the fridge with their favourite meals (from lists you can have them prepare). Teach them to cook healthy food. Don't just let them crash out in front of the TV and order in fast food (although that's what they may demand). Get them outside participating in sports and physical activities; build a tree-house, go fishing, hunting, mountain-biking, kiting, orienteering, camping, etc. It will do you as much good as them (get rid of that beer gut or those love handles). Buy *the Dangerous Book for Boys* or *the Great Big Glorious Book for Girls*. Take them to visit grandparents and favourite relatives.

Don't take your children shopping, not even for groceries. Your finances will be strained and you don't need the pressure they will bring to bear on you to buy them stuff. Instead, listen and watch for a special toy or other item they may yearn for and buy it as a surprise gift the next time they come to stay.

Don't disparage their other parent in front of your children, even if you are aware he or she is alienating them against you. The children love you equally and your criticisms of one another will only confuse and stress them. In the long run, it is counterproductive for either parent to vilify the other. Eventually – and it may be a long way down the road – the children will see through the criticisms and lies and will turn against an alienating parent. And never argue about aspects of the court case or any other issue in front of them: this will just make them more anxious and angry about their new fractured situation.

Try to keep in touch with your children through any channel possible when you see them very little or not at all. Write to them, send cards and little gifts, telephone them, send them emails. Keep copies and a record of all the things you send if you suspect your children's other parent is intercepting your correspondences and the children are not getting them. Somewhere down the road you will be able to show your child proof of your efforts to keep in touch, and they are then going to know it wasn't your lack of interest in remaining part of their lives, but the interference of the other parent.

Get regular exercise and eat well. Try to jog or participate in sports on a regular basis. Make sure you go for your yearly physical. Avoid the excessive grease, salt and sugar of fast food. Take the time and care to prepare yourself nutritious and healthy foods. Eat lots of fresh fruit and vegetables; have good amounts of whole-grain breads and cereals; eat lean cuts of red meat, poultry and fish.

Get yourself a pet. Preferably a dog. There's nothing like the unconditional love and affection of a faithful pet when you return home from work or Court at the end of an exhausting day. That wagging tail, affectionate gaze and total lack of attitude can do wonders for you. And the walk it will demand every night will be good for your mind and body too.

If you are religious, keep going to your church, synagogue, mosque or temple on a regular basis. You may find you don't get much support from that quarter, but don't be put off. Even if you are not religious find some quiet time for reflection and meditation, to drop right out of your ordeal and refresh your soul and spirit.

Don't be too proud, as a man, to rely on your friends and family for emotional support. Don't think you have to carry the often overwhelming burden of the injustices and the stresses of your case by yourself. Talk to them. Getting things off your chest really helps. Your friends and family, who love you, will usually be there to share the weight of the ordeal. Understand though that they too can become weighed down by your case if you go on about it too much. Don't become a broken record; use their sympathy wisely. And let your friends entertain and distract you from the seriousness of your circumstances.

Go easy on yourself. You will feel like a failure: a failure in marriage, a failure to your children, a financial failure. Accept responsibility for any role you may have played in the debacle, but DON'T BEAT YOURSELF UP OVER IT. Realise that your children need your emotional support, so give yourself a break: be easy-going and affectionate with them. You walked into a minefield when you entered the domain of family law and you are going to take a pounding; it isn't your fault. Try not to let it stress you out.

Don't get obsessed about what your children's other parent is doing, or planning to do. Concentrate on what you are doing. You can go crazy worrying about the things they are doing. You cannot control them, just yourself.

Help others in similar circumstances and join the fight for parents' rights and equal parenting. Join a parents' rights organisation and join in demonstrations and protests; write letters to newspapers and to your MP, go to his or her surgeries; speak to the press, go on TV. If this is beyond you (some people just can't do it) then be generous with your time and advice to fellow victims of the sham of family law. It gives you the reassurance that you are doing something constructive. It will take serious and concerted efforts by all of us to bring about the changes that are needed for a fair system of family justice.

Final point: members of the opposite sex are not the enemy. Just because your ex turned out to be your worst nightmare, and just because in your case the Court seems to have sided with the other parent, remember that parents and grandparents of both sexes lose their children and grandchildren in the Family Courts, or have to return their children to parents they know will abuse them.

Family law has become corrupted through secrecy, through the greed of lawyers and others, through the successful lobbying efforts of gender feminist organisations and through the reckless vote-chasing by irresponsible politicians. Your father and mother, your brother and sister, your male and female friends and your new partner are all as appalled and saddened as you are at the injustice of it all. And they stand by to help and support and nurture you in your fight for fairness for you and for your children.

6.1.3. Family justice 101

Absolute justice in a system such as the UK Family Courts is not achievable, and you may well end up one of its many victims. Journalist Melanie Phillips writes,

> *Family lawyers... maintain that justice has no place in their courts; Family Court judges thus preside with equanimity over injustice, having turned themselves onto a division of the therapy and social work industries.*[265]

Other parents have triumphed however, sometimes after a very long time, with perseverance, hard work, and frequently the expenditure of a great deal of money – either their own or the taxpayer's. This volume presents some of the strategies which have worked, and have resulted in restoring meaningful relationships between children and their parents.

If it is at all possible **AVOID GOING TO COURT**. If you don't it will be the most costly, the most stressful and the most disagreeable experience of your life. There is steadily rising demand for Family Court services and serious gaps in budgets and supply, for example of separate representation for children.[266] CAFCASS are in crisis and their reports can take the best part of a year to prepare. You really

[265] Melanie Phillips, *Goodbye Lords, Hello the Dictatorship of the Judges*, Sunday Times, 14 November 1999

[266] Catherine Baksi, *Child welfare fears add to justice burden*, The Law Society Gazettte, 04 September 2008, http://www.lawgazette.co.uk/news/child-welfare-fears-add-justice-burden

are *very* strongly advised to resolve your differences without going to Court.

Most couples achieve this, though Government figures are dishonest. Lord Adonis, for example, claimed that 'about 90 per cent of separating parents make provision for bringing up their children, including contact arrangements, without recourse to the courts.'[267] Actually this frequently repeated statistic measured something else entirely[268] and the true figure is somewhere between 30% and 40%.[269]

Even then, it would be wrong to believe that the majority who don't litigate end up with satisfactory, mutually agreed arrangements.

You will doubtless hear both fathers and mothers talk about gender bias in the Family Courts. We don't want to get into this debate here, but we will say this: most of those who work in the family justice system (and many outside it, like the Prime Minister) believe that if a father is designated 'absent', if he is the non-resident parent, then he has brought that upon himself by abandoning his family and his responsibilities. His task in the courts, therefore, is to prove himself a good parent, and to earn the right to contact with his children.

Fathers are doubly disadvantaged because the situation in which they suddenly find themselves is typically one which their children's mother has been planning for months before finally executing. If she has legal advice she will be plotting to take his children and his home off him and to deny him any chance of getting them back.

Mothers typically find themselves in the Family Courts trying to protect their children from a violent, abusive or manipulative man. Perhaps he has abducted the children. Perhaps the mother has become her children's non-resident parent and is fighting to maintain contact with them.

Family Court professionals are not trained to distinguish adequately between good parents and bad; between abused children and those who are not abused. Good parents of both genders lose their children to abusive and violent parents who have managed to use the failings of the courts to their advantage, and manipulate the poorly trained professionals to believe them. Remember that the Family Courts act on the balance of probabilities; you don't need actually to prove anything – just show that it may be more probable than the alternative.

Don't spend time assimilating your situation, **act on it**. Your children's other parent is already many steps ahead of you and you must act **NOW**, swiftly and decisively. This usually means getting an *ex parte* or urgent ***inter partes*** order for residence and interim residence (you can worry about what these terms mean later, or look at the **Glossary**) before they leave the family home (or oust you from it) and take the kids. If they have already taken the kids or you are living out of the back of your car, you are already too late to do that and need to take other advice in this manual.

[267] Hansard, 29 June 2005, http://www.publications.parliament.uk/pa/ld200405/ldhansrd/pdvn/lds05/text/50629-04.htm

[268] The Blackwell and Dawes report of 2003 sampled 961 parents *for whom contact was working*: about 11% of them had court-ordered agreements at the time they were questioned; see Blackwell, A. and Dawes, F., *Non-Resident Parental Contact*, based on data from the National Statistics Omnibus Survey for the Department for Constitutional Affairs, October 2003.

[269] Letter to Gary Burch of Fathers 4 Justice, 21 September 2003

If you have separated from your partner and they have not *immediately* taken steps to establish reasonable contact between you and your children, do not waste time 'negotiating',
START PROCEEDINGS FOR CONTACT NOW.
Any delay at all will prove extremely damaging.

The belief that your child will want to see you again when he is older is little more than an urban myth. He may do, but if he has effectively been alienated against you it is likely he will not. Sometimes children seek out their excluded parent when they reach adulthood; sometimes when they marry; sometimes when they become parents themselves; but there are no guarantees. The reality therefore is that you may only have one certain chance: today. Don't put it off, don't delay: if you do not restore contact now you may never get the chance again; make that application!

It is beyond the scope of this guide – which concentrates on your legal strategy – to discuss in detail why it is that some parents try to thwart or end all contact between their child and the other parent, but there are two basic scenarios:

1. **The Punisher**: Your children's other parent is aggrieved about some slight, real or imagined, of which you are alleged to be guilty, and is trying to punish and to hurt you. He or she knows how much you love your children and understands that the best way to make you suffer is to threaten to stop you seeing them, and to reduce your contact. It is probable that they don't intend to prevent contact for ever, and understand that eventually they will have to capitulate.
2. **The Eraser**: Your children's other parent wants to 'move on', probably with a new partner. He or she wants to start a new life, of which you will not be a part. The Eraser cannot understand that the needs and welfare of the children may be different from their own. The Eraser wants you out of their life and as far as they are concerned their children's lives are inseparable from theirs. The Eraser cannot understand what role you can possibly continue to play. You are the past. You are irrelevant. Any attempt by you to remain in your children's lives is perverse. It is an attempt to prevent them embarking on a new life. It is an attempt to control. It must be stopped by any means necessary. The Eraser may well be mentally ill, or perhaps they have just had their head filled with some feminist bullshit about how fathers should have no right of access to their children.

One further piece of advice: the ultimate aim is to ensure that your children maintain positive and healthy relationships with *both* of their parents. You may need to fight to achieve this, but please keep any fighting to the minimum necessary. Remember that however badly your children's other parent is behaving, your children still love him or her, don't interfere with that. The less you fight now, the fewer fences you will need to mend later. Never hate your ex-partner more than you love your children. Remember that.

But before you do anything, make sure that you are prepared. Whether you are intending to go to Court using a solicitor, whether you are going to go to Court as a Litigant-in-Person, whether you are going to use a McKenzie Friend or whether you are going to seek

advice from a self-help group or from an internet forum, you need to do the five things in this chapter:

- Firstly, you need to have clear answers mapped out to the 20 questions which appear below;
- Secondly you need to prepare your *Chronology;*
- Thirdly you need to prepare your *Parenting Plan;*
- Fourthly you need to research your case and prepare your *Case Theory;*
- Fifthly you must put together your *File*.

6.1.4. Twenty questions

These are the questions you need to answer if you ask a written question on an internet forum or use a McKenzie Friend; you must put all this information into your question, if you don't you will only be asked for it later. It is a good way to start thinking about your case:

1. How old are your children?
2. Where in the country do you live?
3. How far from your children do you live?
4. How close to their school are you?
5. Do you work and if so, do you work the sort of hours that enable you to take your children to school and have your children to stay overnight?
6. Does the other parent work?
7. Do you have your own home, or have a room where your children could sleep overnight?
8. Were you married to your children's other parent?
9. If you were married, are you now divorced?
10. If you were not married, and you are a father, do you have Parental Responsibility (mothers have this automatically)?
11. How often do you see your children, and when did you last see them?
12. Has the other parent made any allegations against you, and is there any truth to them?
13. Have you already been to Court?
14. Who filed the application?
15. Have CAFCASS seen you and have they produced a report?
16. What order/s – if any – has the Court made?

17. What stage are you at the moment; do you have an imminent court date?

18. What are the problems at present over which you are going to Court (refer to your Chronology); is contact being obstructed, for example, or are your children being abused?

19. What led to these problems?

20. What do you want the outcome of litigation to be (refer to your Parenting Plan)?

6.1.5. Chronology

Your chronology is **the most important document** you need to prepare for family proceedings. It must contain *everything* relevant to your case in chronological order. It can then act for you as an *aide memoire* and to help you to clarify the course of events. It is vitally important to keep it up-to-date while things are fresh in your mind. Here are some of the things it must record:

- The date you and your children's other parent met;
- The date of your marriage;
- The date of your divorce;
- The dates of birth of your children;
- The dates of any incidents of domestic violence or abuse;
- The dates of any acts of infidelity;
- If you are going to bring up your ex's mental health, dates and details of any treatment and consultation; dates of suicide attempts, etc., if appropriate;
- Details of events leading up to the breakdown of your relationship and events following;
- Details of every period of contact with your children, including arranged contact which never happened; include photographs and video where available;
- Every single letter written to and received from your ex, with a brief summary;
- Details, dates and times of all telephone calls, with brief summary of what was said;
- Dates, times and text of all emails and SMS text messages;
- Details of all meetings with any legal advisors;
- Details of letters to and from solicitors, McKenzies, etc.;
- Details of all telephone calls to and from solicitors, McKenzies, etc.;

- Details of all court hearings and subsequent orders;
- Details and summaries of statements, affidavits, etc.

Cross-reference *everything* and file it all so that you can produce any document or recall any conversation on demand. Keep this in electronic format on your computer so that you can produce copies of documents easily. Remember to back it up! Also keep it filed in hard-copy for when you go to Court.

It is absolutely vital to do all of this. When things turn traumatic your mind will start to block out some of the events you find it too disturbing to remember, and you will need to have written records.

Sometimes it is remarkable what emerges from a comprehensive chronology; patterns can come to light which you would not otherwise have seen, and these can be very useful in fighting your case – in refuting false allegations, for example.

6.1.6. Parenting plan

Your parenting plan sets out in detail how you expect to share the care of your children once you have been granted the order for which you are applying. There's no point going to Court if you don't know in detail what you want from the exercise.

Have a look at how parents who don't go to Court divide their children's time; some children, for example, will spend the school week with one parent and share the weekends and holidays. That arrangement, however, can mean one parent gets all the drudgery and the other all the fun. You need to aim for balance.

6.1.6.1. *You need to include day-to-day matters:*

- With whom will your children routinely live?
- When will they spend time with each of you (this can be set out as a calendar)? You need to be flexible with this – courts don't like you to be specific about percentages.
- How will you explain the new arrangements to them?
- How will you build flexibility into these arrangements?
- What arrangements will you make for your children to see grandparents, other relatives and their friends?
- Who else will look after the children?
- What other forms of communication will there be (letters, email, phone calls, etc.)?
- What ground rules will you set for your children for both parents to follow (bed times, homework, etc.)?
- What about the family pets?

6.1.6.2. You need to consider less everyday matters:

- What will happen if you start a new relationship; how will you introduce your new partner to your children?
- What happens if you or your children's other parent moves house?
- What agreements will you have about your child's education?
- What agreements will you have about your child's religious upbringing?
- What agreements will you have about your child's medical treatment?
- Whose responsibility will it be to arrange regular check-ups, dental treatment, vaccinations, etc.?
- Whom will your children be with on special occasions such as birthdays and religious holidays?
- What arrangements have you made if one of you is ill or injured or delayed?
- How will you arrange your holidays?
- Suppose one of you wants to take your child abroad (see **Section 3.2.7**)?
- Which one of you will look after your child's passport?

6.1.6.3. Think about schools:

- What information will you give the school about arrangements for your child?
- Whom should the school contact in an emergency?
- By what surname should your child be known (see **Section 3.3**)?
- Who will take your child to school each day and collect him?
- What arrangements will you make with the school to keep both parents informed about your child's progress?
- Will you attend parents' evenings and other school events together or separately?
- What arrangements will you make to agree school trips, course decisions, future schools, etc.?

6.1.6.4. Think about financial issues:

- What arrangements have you made for child support (assuming the CSA or CMEC is not involved)?
- Who will pay for clothing, school uniform, etc.?

- Who will pay the cost of travel between each parent?
- Who will pay for school trips, music lessons, sports training, etc.?
- How will you fund your children through college or university?
- Have you made a will?
- Have you appointed a guardian to care for your child in case you should die before your child reaches 18?

It will be clear from reading the above that some degree of cooperation and communication is necessary between yourself and your ex. In many cases this will not be possible and you will need to consider mediation, an intermediary, or other help. It is vital to put your children's interests ahead of your own; the courts must be considered only as a last option.

6.1.7. Researching your case

If you represent yourself you will need to become your own lawyer and your own legal researcher. Don't leave everything up to your McKenzie.

Family law works by means of reference to case precedents; when fighting your case you will refer to precedents which will persuade the judge to decide the case in your favour. You must also be aware of precedents which indicate an alternative decision so you can counter the arguments the other side will bring. If you are to win your case as a Litigant-in-Person you will need to work very hard indeed, familiarising yourself with the law and researching precedents.

Do not rely on media reports of cases which will be incomplete and misleading; use resources such as Bailii and Family Law Week which enable you to look up the judgements themselves on line.

Be wary when looking up cases to ensure that they really are relevant to your case. Merely because a court has made a decision in one case does not mean it will make the same decision in yours. Be clear about exactly the argument you are using case law to support, and reference the page or paragraph number containing the supporting evidence. Always stick to the fundamental principle of the child's best interests and the welfare checklist.

If arguing for overnight staying contact, for example, you would cite a case precedent in which overnight staying contact had been granted in circumstances similar to yours and give the paragraph number of the judgement. The judgement would then form part of your bundle.

You can also use academic research papers in the same way; cite the relevant item of research and give the page number, and include it in the bundle. Learn how to search the internet for relevant research using Boolean logic; try the **Boolify** site to get you started.

Court cases are referenced using a shorthand which looks something like this:

F v Leeds City Council [1994] 2 FLR 60 or
Re R (Surname: Using both Parents') [2001] 2 FLR 1358

The first term is the usual name of the case, and will either be the full name of the litigants – e.g. Zwadaka v Finland – or just a pair of initials which may or may not reflect the parties' names. In these cases 'v' is short for the Latin *versus*, meaning 'against'. The secrecy with which the Family Courts are veiled demands that most judgements are anonymised, so M v F is common (Mother versus Father). Alternatively cases are named after the initial of the child (Re R) where *re* (pronounced 'ray') is short for the Latin *in re* meaning 'in the matter of'. Sometimes the English translation is employed.

The words in curved brackets are occasionally omitted and give a very brief description of the most salient aspect which in some cases makes it a precedent or authority. The year is given in square brackets.

The remaining numbers and letters indicate either the Court (EWHC) and case number – this is known as a 'neutral citation' – or the volume of law reports in which the case is bound. In the example above the case is in the 2nd volume of **F**amily **L**aw **R**eports for the year **2001**, beginning at page number **1358**. The most common acronyms are:

AER or **All ER** – All England Reports
BMLR – Butterworth's Medico-Legal Reports
CA – The Court of Appeal
ECHR – the European Court of Human Rights
EWHC – the High Court of England and Wales
FCR – Family Court Reports
FLR – Family Law Reports
HL or **UKHL** – the House of Lords
QB – the Queen's Bench Division
UKSC – the United Kingdom Supreme Court (from 2009)
WLR – Weekly Law Reports

There are various on-line resources where you can look cases up, otherwise try a search engine:

- The British and Irish Legal Information Institute (Bailii), **http://www.bailii.org/** (currently short of funds)
- Family Law Week, **http://www.familylawweek.co.uk/**
- The International Child Abduction Database (INCADAT), **http://www.incadat.com/**
- Case Check, **http://www.casecheck.co.uk/**
- The Shared Parenting Information Group (SPIG), **http://www.spig.clara.net/**

You will need to access the relevant legislation. Make sure that you are using the most up-to-date version. Most recent legislation (since 1988) is available from **http://www.legislation.gov.uk/**. The site will give you the option to choose between the legislation as originally enacted and the most recent update, but very recent changes will not be listed. For those you need to check the website of legal publisher **Jordans'**, don't rely on websites run by amateurs or volunteers. Also be aware that legislation is not always enacted; the Children, Schools and Families Act 2010, for example, is only partially enacted. Part 2 of the Act is not yet in force, despite having Royal Assent and the passing of a Commencement Order. You will also need to look at a

'Statutory Instrument', the **Family Procedure Rules 2010** which tells the courts how to run cases.

6.1.8. Case theory

The Case Theory or Skeleton Argument is a device used by lawyers which provides you with an outline structure to enable you to present your case in Court. It should be no more than half a page long and will go into your bundle on **Form N163** so that the judge can refer to it.

Your Case Theory must be supported by your evidence; don't include evidence that doesn't support your Theory. It will consist of a series of numbered points that you wish to make; reference any document you want to use in support. The appropriate way to do this is to put your initials in square brackets at the end of the paragraph in which you make the reference and give the document a number, for example, **[AB1]**, **[AB2]**, etc. The documents will also be numbered **[AB1]**, **[AB2]**, etc.

Use the same standard heading which is used for the index to the bundle, below. The Case Theory will help you to keep things simple, succinct and relevant, and it will keep you focused.

- Begin by introducing yourself and any witnesses you intend to call; do not refer to witnesses who won't testify or whom the Court won't summon.
- Establish your 'road map': how you intend to present and conduct your case. Remember, if you are the applicant this is your case and you are in charge.
- Summarise your story and the major significant events. Explain clearly and in greater detail the events which have led to court: any obstructed contact, etc. You have already done this work when you prepared your answers to the 20 Questions and when you prepared your Chronology. Make the story interesting and compelling; rich and detailed but not too long or too creative.
- Present your evidence; this is made up of the facts upon which the judge will make a decision. You may find it helpful to use the points in the Welfare Checklist to guide you. This is also where you can present the research evidence you have attached to your position statement and any case precedents which support your position. Be careful only to refer to evidence you know can be presented to the Court and which you can substantiate. Make certain you are accurately presenting the law – you don't want to be caught out by getting it wrong. Try to anticipate what the other side will say and deal with those points boldly, you may not get the chance later. Suppose you were the other side's lawyer; what would your strategy be? If the case is about contact, prepare answers to all possible objections. If you know what arguments or case law the other side is going to use, now is the time to counter; show why the case law isn't applicable or present an alternative example. Remember to bring copies for the other side and the judge.

- Tell the judge what you want to be the outcome of your application; tell him what type of order you would like the Court to make. This will be an order for Contact or Residence if you are being prevented from seeing your child, or it may be a Prohibited Steps or a Specific Issues Order. Tell the judge how you see the relationship with your child working; again, this is work you have already done when you prepared your Parenting Plan.

6.1.9. Your file

Family Court litigation will produce a great deal of paperwork, at least a large lever-arch file every year. When it is full buy another one to save you having to sort through what you still need – don't throw anything away before your children reach 16. You will need an efficient filing system with file dividers and indexing to keep it all organised and accessible. The last thing you want is to lose an important document when you most need it. You will need to have sections for:

- Your Chronology
- Applications to the Court and orders from the Court
- Correspondence between yourself and the Court
- Correspondence between yourself and other parties/solicitors
- Position and witness statements
- Reports from CAFCASS and expert witnesses
- Case precedents and research evidence
- Miscellaneous

Put everything in chronological order, matching your Chronology. If you are using a lever arch file this is awkward, it's easiest to have the most recent documents on top, but if you arrange it with the most recent at the end it will mean that everything is in the same order as the Bundle. Don't print on both sides of a piece of paper, you may miss something when searching through, and don't use 'slippery fish', you may fumble when trying to get a document out. Do use different coloured 'Post-it' notes to identify documents you need to refer to at a particular hearing.

Keep copies of all letters and file them, keep printed copies of all emails; where possible keep electronic copies of everything so that you can produce copies easily and quickly. Make sure this is regularly backed up, preferably somewhere other than your home.

6.1.10. Your bundle

The collection of documents used by the Court is referred to as 'the bundle'. This will be compiled from the documents in your files, but not all of them – it will exclude your research, and correspondence between you and your solicitor or McKenzie, for example, or with the Legal Services Commission.

The latest Practice Direction, **number 27A**, has been issued following the introduction of the Family Procedure Rules 2010 in April 2011 (in all respects this is identical to the President's Practice Direction of July 2006).

You will need to bring your bundle with you to all hearings. The only exceptions are emergency *ex parte* hearings, and you will then have to bring the bundle to the subsequent *inter partes* hearing.

If you are a Litigant-in-Person (LIP) you do not always need to file a bundle; the responsibility to do so lies with the applicant if you are represented (your solicitor will do it), or if you are not represented with 'the first listed respondent who is not a Litigant-in-Person.' If all parties are LIPs the applicant will have to prepare the bundle. This ruling was introduced in November 2006 and means that an LIP often loses control over the contents of the bundle, and you will have to pay the opposing solicitor for the bundle if costs are awarded against you.

The other party's solicitor is not obliged to send a copy of their bundle to you, only an index; you are presumed to have copies of all the relevant documents. Make sure they are in your file and in the same order. Usually they will supply the bundle for a fee (exorbitant of course, 25p per sheet is typical). To avoid high costs you need to keep on top of things and monitor closely what is going into the bundle, and make sure you keep copies of everything. The judge should make directions about when you are to receive the bundle and when you are to have agreed it with the other side – if he doesn't, ask him.

Whilst it is tempting to let the opposing solicitor do the bundle work, the real danger is losing control over the bundle content. Solicitors have a nasty habit of leaving out things important to an LIP's case, and filling the bundle with irrelevant stuff such as huge swathes of correspondence (the more they put in the more money they make, of course).

If you find yourself obliged to prepare the bundle you will need to read the Practice Direction; we summarise the relevant parts below. You will need to produce an index which you must copy to your ex and you must ensure that you provide your ex with any documents they don't have. The bundle must be paginated so that all parties and the Court have the same documents in the same order.

Format

The Practice Direction is strict about the format and contents of the bundle, so you must ensure that you prepare it correctly.

You must present the bundle in one or more lever arch files. Each one must contain no more than 350 pages.

On the spine and on the front cover you must write clearly:

1. The title and number of the case;
2. The Court where the case is listed;
3. The date and time of the hearing;
4. The name of the judge (if known); and

5. Where there is more than one file they must be numbered A, B, C, etc.

The Contents

The bundle must contain all documents relevant to the hearing; if in doubt, include it. They must be in chronological order starting from the front. There must be a complete index at the front, and each document must carry a page number. Using divider cards you must create the following sections:

1. Preliminary documents and case management documents. Each must have a front page carrying the heading, and immediately below it the date on which the document was prepared and the date of the hearing for which it was prepared.

   Items (i) to (v) must be cross-referenced to the relevant page in the bundle.

   Items (i), (ii), (iv) and (vi) must be agreed between all parties. Where you are unable to agree the fact that you cannot agree and the substance of the disagreement must be recorded on the document.

   The preliminary documents are:

   i. A single A4 page (ideally) summarising the background to the case; it must be limited only to those matters which are relevant to the hearing and case management;

   ii. A statement of the issues (1) which are to be determined at the hearing and (2) those which are to be determined at the final hearing;

   iii. A Position Statement from each party summarising the orders or directions sought (1) at that hearing and (2) at the final hearing;

   iv. If the summary at (i) is insufficient, an up-to-date chronology;

   v. Your Case Theory (Skeleton Argument) together with copies of any precedents or research you are relying on;

   vi. A list of all the documents you want the judge to read prior to the hearing;

2. Applications and Court Orders;

3. Statements and affidavits, dated on the top right corner;

4. Care plans (where appropriate);

5. Reports from expert witnesses and any other reports, including those from the guardian, Children's Guardian and litigation friend;

6. Any other documents as appropriate, or as directed by the judge (these may need to be further sub-divided).

For a brief hearing, perhaps to arrange a single direction, it may not be necessary to provide the complete bundle, in which case the summary must state that it is incomplete. It must still be agreed between the parties.

For each hearing you must update the bundle and produce new summaries, statements of issues, chronologies, and skeleton arguments. Remove the old ones from the bundle and put them in your file.

Time Estimates

The Practice Direction requires you to estimate how much time the judge will need in order to read the bundle, how much time will be required to hear all the evidence and submissions and how much time will be required by the judge to prepare and deliver judgement. These estimates must then be inserted at the front of the bundle.

Obviously if you are an inexperienced Litigant-in-Person you won't have the faintest idea how much time is required for all this and you will have to say so.

Timetabling

If you are responsible for preparing the bundle you must provide a copy of the paginated index to all other parties not less than 4 working days before the hearing.

If you are representing yourself but also instructing a barrister or if the other party is instructing a barrister, you must give them a copy of the whole bundle not less than 3 working days before the hearing.

The bundle, excluding the preliminary documents, must be lodged with the Court not less than 2 working days before the hearing. The preliminary documents must be lodged not later than 11:00 on the day before the hearing. In the High Court you must also email the preliminary documents to the judge's clerk.

Lodging the Bundle

You must lodge the bundle with the appropriate office.

For hearings in the Royal Courts of Justice the bundle must be lodged in the office of the Clerk of the Rules, Room TM 9.09, Royal Courts of Justice, Strand, London WC2A 2LL. If the bundle is delivered after 11:00 on the day before the hearing it must be delivered directly to the relevant judge's clerk.

For hearings in the Principal Registry the bundle must be lodged at First Avenue House, at the List Office Counter, 3rd floor, First Avenue House, 42/49 High Holborn, London, WC1V 6NP.

For hearings at any other court the bundle must be lodged at the Court office of the Court where the hearing is to take place unless you are told otherwise.

If you send the bundle by post or courier it must have the appropriate office clearly marked on the packaging, together with the date and place of the hearing.

If you deliver a bundle in person you should obtain a receipt from the clerk, and if you post it you must obtain proof of posting. This evidence must then be brought with you to court.

It is vital that you lodge the bundle well before the deadlines. There are various penalties and rules which apply if you are stupid enough not to and which you can look up for yourself if you are interested.

Removing the bundle

After the hearing you must retrieve the bundle from the Court immediately or, if that is not practicable, within five working days. Bundles which are not collected in due time may be destroyed.

Taking Cases out of the List

If for any reason you decide not to go ahead with the hearing – perhaps because you have reached agreement – you must inform the Court as soon as possible by telephone and back this up by letter. Where possible this should be signed by all parties.

You must give some background to the case and details of the order being sought, and give an explanation of why you want the case removed from the list.

The index to your bundle will look something like this:

IN THE (*Give the name of the Court*) **COURT** **NO. OF MATTERS:** (*Put your case number here*)

BETWEEN:

(*If you are the applicant, put your full name here*)
APPLICANT

AND:

(*If your children's other parent is the respondent, put her full name here*)
RESPONDENT

INDEX

Section/Date	Document	Page Number
Section A	**SUMMARY**	
[*Date*]	[*This is a brief page giving details of the case number, the parties, and any orders. Also include a very brief outline of the issues in dispute, and the order you want the Court to grant*]	[*Page No.*]
Section B	**CHRONOLOGY**	
[*Date*]	[*This is the Chronology you have already prepared*]	[*Page No.*]
Section C	**STATEMENT OF ISSUES**	
[*Date*]	[*This is a page where you set out in greater detail the issues in dispute and the course of litigation*]	[*Page No.*]

Section D	**PLEADINGS FOR CASE NUMBER** [*Enter the Case Number*]	
[*Date*]	[*Here you list – and include in the bundle – copies of Forms C100 and C1A where relevant; the copies of directions made in the case and copies of any orders made.*]	[*Page No.*]
Section E	**EVIDENCE FILED ON BEHALF OF THE APPLICANT**	
[*Date*]	[*In this section you include all statements by the applicant and the documents relied on – i.e. relevant research and case precedents*]	[*Page No.*]
Section F	**EVIDENCE FILED ON BEHALF OF THE RESPONDENT**	
[*Date*]	[*In this section you include all statements by the respondent and the documents relied on – i.e. relevant research and case precedents*]	[*Page No.*]
Section G	**REPORTS**	
[*Date*]	[*In this section you include all reports, such as the Schedule 2 letter and Section 7 welfare reports by CAFCASS and any reports prepared by expert witnesses*]	[*Page No.*]
Section H	**SKELETON ARGUMENTS**	
[*Date*]	[*In this section you include both the applicant's and the respondent's skeleton arguments*]	[*Page No.*]

Signed this [*Day of the month*] Day of [*Month*], [*Year*]

Signed……..……

The Court will hold a file on you, containing the bundle. Arrange an appointment with the clerk of the Court to view it.

You are entitled to take copies of any documents you may not have seen. Very often there is correspondence contained in these files which will not have been copied or disclosed to you. Sometimes the Court will be reluctant to cooperate with this, so you must insist, and see the duty judge if necessary.

Any litigant going to Court without obtaining regular access to his file is committing LEGAL SUICIDE.

6.2. Applications

6.2.1. Do you qualify?

Section 10 of the Children Act 1989 prescribes who may make an application to the Court as of right.

You may apply for any Section 8 order if:

- You are the child's parent or guardian;
- You already have a Residence Order in respect of the child.

You may apply for an order for residence or contact if:

- You are a party to the marriage in relation to which the child is a child of the family (this covers you if you are the victim of paternity fraud);
- The child has lived with you for at least three years;
- You have the consent of everyone with a Residence Order in respect of the child;
- You have the consent of a local authority where the child is in the care of that authority;
- You have the consent of everyone with Parental Responsibility for the child.

If you don't qualify you will need the leave of the Court to make an application, for example, if you are the grandparent or sibling of a child. You must make an application under part 18 of the Family Procedure Rules 2010. If you are not a party but have PR for the child you can ask to be joined as a party under **Family Procedure Rule 12.3(2)**.

6.2.2. General advice

Never be the respondent in a case; always be the applicant, as respondents are invariably at a disadvantage, and are forced to react to whatever the applicant does. **Fathers**: note that whereas in the divorce proceedings you were almost certainly the respondent, if you are now the applicant the other parent is the respondent.

Do not delay. The longer you delay, the longer you allow a new *status quo* to be established which you will then find difficult to overturn. Fathers sometimes dither for months before making their first application. This is terribly destructive to a case, and very challenging to recover from. As soon as there is any threat at all to your contact you must make an application and thereafter remain proactive.

Never give your ex any indication that you are about to make an application or what your strategy is likely to be. This is an adversarial system – the winner takes all and the loser can lose everything. When you make an application it must be served on the other party; ensure that you only do this at the last minute allowed; do not give them any more time than necessary to prepare their response.

Applications are governed by Parts 18 and 19 of the Family Procedure Rules 2010. Part 18 applies to making applications to start proceedings, making applications in proceedings already commenced and making applications in relation to proceedings already concluded. Part 19 applies to applications for permission to appeal and applications not covered by Part 18.

Applications may either be to commence a case or relate to a case already proceeding. Once you have decided what order you wish to apply for, and have worked out in your Parenting Plan the detail of what you want from the Court it is time to make your application.

You can make your application through a solicitor, which by the time you finish will cost you tens of thousands of pounds if you can't get legal aid, or you can do it yourself as a Litigant-in-Person (LIP). Whatever the reason for your application, and the order you want as a result, the first vital piece of advice is to ACT QUICKLY. The longer you delay and the situation you are trying to reverse becomes established, the more difficult it will be for you to restore the relationship with your children. Delay also gives an obstructive parent more time to prepare false allegations; they will probably still be made, but acting promptly allows less time to refine them.

If you decide to act as an LIP you need to go to a court; Family Courts are listed on the **Directgov website** or see **Resource 1**. Completion of forms in children's proceedings is determined by **Part 5** of the Family Procedure Rules 2010.

6.2.3. Filling out the forms

The application forms are available from your local court or as PDFs from the **Ministry of Justice website**.

- **Form C100** is used *only* to start an application for an order under Section 8; it replaces the old C1 form and introduces some new fields such as parties' places of birth and previous surnames. The purpose of this is to make identification of parties easier and to rule out 'false positives' in order to reduce delay. It is therefore important to fill in all fields accurately or you will find the Court process even slower.

- Some other Children Act applications, such as for Parental Responsibility, are still made using the older **Form C1**. If you are unsure which form to use, ask at the Court.

- You use **Form C2** if you need the Court's leave to start proceedings (for example, if you are a sibling or grandparent), if you want an additional order or directions in existing proceedings, or if you want to be joined as a party to existing proceedings;

If you believe your child to be at risk of violence, abuse or abduction, you will also need to complete **Form C1A**.

The Court will provide you with guidance booklets **CB1**, *Children and the Family Courts*, **CB2**, *Filling in the Forms* and **CB3**, *Serving the forms*, and **C1A Notes**; these are also all available as PDFs from the website. Once you have filled out the forms take or post them to the Court together with **payment**.

6.2.4. Filling out Form C100

The new Revised Private Law Programme (covered in **Chapter 8**) advises that delay will be caused if **Form C100** is not fully completed, especially the information on page 1 and sections 1 and 7.

1. **You MUST complete this section fully.**
   Tick the appropriate box according to whether you need the Court's permission to make the application. See the rules above on who qualifies to make an application without leave of the Court.
   Enter your name and that of the respondent.
   State the name of each child, their date of birth and sex, the order you are applying for.
   Give their relationship to you and to the respondent(s).

   Note: there will be circumstances in which you do not know your child's exact date of birth or name if, for example, your child is born after you separate. You will need to refer to your child as Baby X, where X is the presumed surname, and give an approximate date – write in an empty box 'approx.; exact DoB not known'.

2. Give your name, gender, date of birth, place of birth, address, phone numbers, email address and previous addresses.

3. Give the same details for each respondent to your application, where known.
   Where it asks for 'Address (to which documents relating to this application should be sent)' give their home address, even if you know they are using a solicitor. Always try to ensure that the respondent has the minimum time available in which to prepare their case.

4. Give the same details for anyone else who should be informed of your application. See **Section 6.2.9**.

5. Provide details of your solicitor. If you are using a solicitor enter their name, firm, address and telephone numbers, etc. (these details will be on their letter headings).

6. State whether your children are known to social services and if so give details.
   Tick if your children are subject to a protection plan.
   Tick if your children share the same parents and give the names and details of the parents.

State who has Parental Responsibility for the child and their relationship.
Where you are asked to state with whom the child lives and give details of any other adults living there, do not say, 'with the other parent' because this establishes a status quo in which they do not live with you. State instead that they have lived with both of you up until very recently and that it is only in the last 2 months (or whatever) that your ex has been preventing contact.
There is room for the details of 4 children, if you have more photocopy the pages and fill them out.

7. **You MUST complete this section fully.**
Give your reasons for making the application and what you want the Court to do – i.e. what order you want.

The form asks only for a summary – 'You may be asked to provide a full statement later.' But you may not be asked; do you want to take the risk? Don't fall for their assurances; better now to provide a comprehensive and well-argued case including all the relevant case law, etc.
There are too many instances where judges have refused to allow parties to submit their full case, or have prevented the full case from being critically examined when the time came, so take the approach of getting it all submitted now and entered into your case file (the file in the Court Office where all papers related to your case are held).

You are advised, therefore, to type out your full statement (concisely – don't make it excessive) and to use the box on the form as a summary or index of what you are asking for, where each point includes a reference to much more information that you include as part of an Attachment to the form.
You should also attach a draft version of the order you want the Court to make – either for contact or shared residence. Don't simply hope that the judge will make an order which will be to your satisfaction; as part of your application you include the actual wording of the order that you are seeking. Make this bullet-proof: it must cover every aspect of your children's lives: weekdays during term time, weekends during term time (e.g. from 4pm Friday through to 10am Monday), birthdays (father, mother, grandparents both sides etc.) significant days (Mother's Day, Father's Day), alternate Christmas and Easter holidays, alternate school midterms, fully half of school summer holiday, who is to deliver, who is to return the children, who is to pay any handover/travel costs.
When you have drafted this, get a McKenzie to check it for you, or submit it for approval to an online forum.

Tick the appropriate box regarding whether you have received the booklet ***Parenting Plans: Putting your children first; a guide for separating parents***. You can download this from the CAFCASS website.
Tick the appropriate box regarding whether you have attended a mediation information/assessment meeting.
If you have, briefly explain what happened and what the outcome was.
If you have not, briefly explain why.

8. Tick whether you think your children are at risk of domestic violence, abduction, abuse, drug or alcohol or any other harm.
   If you ticked 'Yes' you must then complete form C1A.

9. Give details of any current or completed court cases concerning your children.
   Give the child(ren)'s name, the name of the court, the case number and date.
   Give the name of the CAFCASS officer (if any) and the solicitor (if any) and his/her address.

10. Tick the appropriate box regarding whether you or any other party need an interpreter; enter the language in the box below.
    If you are hearing impaired and will need a signer in Court, put it in this box.
    Tick the appropriate box regarding whether you need assistance or any special facilities because you are disabled; enter the details in the box below.

11. Sign and date the form.

Before you put everything into the envelope and seal it, tick the boxes on the final page. Have you:

- Included copies of any relevant orders;
- Signed and dated the form;
- Provided copies of the application and attachments for all respondents and one for CAFCASS (keep a copy for yourself!);
- Completed and attached Form C1A;
- Attached the sheets of additional children if you have more than four;
- Attached the sheets of additional respondents if there are more than two;
- Included the **correct fee** (if you are exempt you must complete and attach **Form EX160**)?
- Checked and rechecked all the information you have provided?

6.2.5. Filling out Form C1A

This form is due to be replaced by Form C100A.

Enter the name of the Court and your child(ren)'s full name(s).

Section 1,

1. Enter your name and details and relationship to the child.
   Enter your solicitor's details; if you have no solicitor say so.

Section 2,

Tick all the types of abuse you and your children have experienced.
Give details of any injunctive orders made in your favour.

Give details of incidents of abuse, violence or harm to yourself or to your children; explain when the abuse started and its duration; did you try to seek help? What was the outcome?

Section 3.

If you think your children are at risk of abduction state this and say why you believe it.
Give brief details of previous attempts at abduction.
Tick if the Passport Office has been informed, and give details of the children's passports.
Tick if the police have been informed.

Section 4.

Give details of any other concerns you may have about your children's wellbeing and safety.

Section 5.

Indicate what steps you want the Court to take to protect your children.
This will typically take the form of an injunctive order; the form briefly explains what orders you can apply for.
Indicate whether you agree to supervised, unsupervised or indirect contact.

Section 6.

Sign and date the form.

Section 7.

Indicate whether there are any special arrangements you would like the Court to make for you when you attend.

Note: this provision is often abused by parties who are encouraged by their solicitors to make false allegations of domestic violence and to demand that the Court ensures they do not come into contact with the other party, thus giving the Court the impression that their allegations are justified.

Ensure that you attach copies of relevant orders to the form.

Unfortunately the introduction of the C1A form a few years ago also effectively promotes the making of false domestic violence (DV) allegations. Previously litigants were not allowed to submit evidence until the Court specifically directed it; to submit evidence immediately had been considered inflammatory and damaging to any possibility of reaching an agreement without going to an all-out contested trial. Partial or even total agreement could be reached at the first directions appointment in Court.

Now that litigants are encouraged to submit DV allegations from the start of proceedings this will be much less likely. The C1 form was simply a brief notice of what the applicant intended to argue; the C1A form is a statement of evidence before the Court has been invited to approve such evidence. In 2011 the form was redesigned and now omits any requirement to provide evidence of the alleged abuse or violence.

6.2.6. Filling out Form C2

1. Enter your name and the respondent's.
   Tick if you are seeking the Court's leave to make an application (e.g. if you are a grandparent applying for contact).
   Give the case number(s) of any existing proceedings.
   State the name of each child, their date of birth and sex, the order you are applying for.
   Give their relationship to you and to the respondent(s).

2. Give your name, gender, date of birth, place of birth, address, phone numbers, email address and previous addresses.

3. Give the same details for each respondent to your application.

4. Give the same details for anyone else who should be informed of your application. See **Section 6.2.9**.

5. Provide details of your solicitor.

6. Give brief details of your application, what order or directions you want the Court to make and why you are making the application.

7. State whether you need an interpreter or have a disability which will affect your attendance at Court.

8. Sign and date the form.

Ensure that you attach copies of relevant orders to the form.

6.2.7. Serving the application

You must either post or take your application to the Court. If you post a document you should use first class post or other next-day service. When the Court receives your forms it must send to CAFCASS within 24 hours, or 48 hours in courts where applications are first considered on paper,

- A copy of your application form C100 and Form C1A;
- Forms C6, C7 and C9 (see below);
- A blank Form C1A (CAFCASS may think there are welfare concerns even if you don't);
- Information leaflets for the parties.

Under the terms of the Revised Private Law Programme[270] – which we also consider in Chapter 8 – the courts are expected to list the **First Hearing Dispute Resolution Appointment** (FHDRA) within 4 weeks of receipt of your application. If that is not possible a timetable must be drawn up between CAFCASS and the Courts Service.

The Court will return your C100 and C1A to you together with the **Forms C6**, **C7** and **C9**. Under **Family Procedure Rule 12.8** you must then 'serve' copies of the application and the forms C6 and C7 to all

[270] http://www.judiciary.gov.uk/docs/judgments_guidance/pratice-direction-pfd-private-law-programme-april2010.pdf

respondents in the case by the date the Court will have given you or not later than 21 days before the hearing. This is your responsibility and not the Court's.

- **Form C6** is the Notice of Proceedings, and the Court will have filled it in with the date, time and location of the hearing (you may also need to complete Form C6A which is given to anyone other than the respondent(s) who needs to attend proceedings);

- **Form C7** is an Acknowledgement of Service which the respondent must return to the Court; and

- **Form C9** is the Statement of Service which you complete and return to the Court only after you have served the other forms.

- **Booklet CB3** will explain how to fill them out and what to do with them.

You should preferably serve the papers on the respondent - or to their solicitor's business address if requested – by first class or registered post; **you must not serve the papers personally**. Under **Rule 6.23(d)** of the Family Procedure Rules 2010 you can now serve papers (but not divorce applications) by fax or email with no hard copy if the party or their solicitor have agreed to this in writing.

If serving the papers fails – if, for example, no response is made to the Court within 14 days – then you can request a court bailiff to serve the papers. This is more expensive (see **Court Fees**), but the bailiff will then be able to provide a certificate of service that the papers were correctly served. You must complete **Form D89** and provide evidence that service has not been successful, giving the address of the respondent. If the bailiff cannot serve the papers at that address you may request that they be served at an alternative address. If you are legally represented you will have to pay a process server to serve the papers.

If you don't know the respondent's current address you must take reasonable steps to ascertain it. Otherwise you must consider where else the papers may be served and request the Court to direct accordingly. Alternatively the Court may make an order to dispense with service.

If the respondent is a child (when a child is party to proceedings) the papers must be served to a parent, guardian or carer. If the child is represented by a Children's Guardian papers must be served on them and also on the solicitor where one has been appointed.

The application is deemed to have been served when the acknowledgement of service is returned to the Court. You will have to confirm to the Court that the signature on the acknowledgement is indeed that of the respondent. If no acknowledgement is filed the Court may still consider that the application has been served if there is evidence to that effect.

How you have served the papers must be entered on your **Form C9**. If the respondent then fails to turn up at Court you have evidence that they were appropriately informed and given the opportunity to present their case.

Full information on how to serve the papers is provided in the **Practice Direction 6A** – Service within the Jurisdiction, which also covers service to forces personnel who may be overseas. **Practice Direction 6B** covers service outside the jurisdiction, including Northern Ireland and Scotland.

Do not serve the forms earlier than the deadline given to you by the Court; this will normally be 14 days before the hearing, or 21 days if they live outside the jurisdiction in Northern Ireland, Scotland or a Hague Convention country within Europe, or 31 days if they live in a Hague country outside Europe. Give your ex and/or their solicitor the absolute minimum notification they are entitled to have under the law; you don't want to give the respondent any more time to prepare their case. For the same reason, serve them on your ex directly, not to the solicitor if there is one. If there is not a solicitor, they now have only 14 days to find one and to prepare for the hearing. This sounds underhand, but we repeat, you are now embarked on an adversarial course, there are only winners and losers, and you may need to play every dirty trick in the book if you are to have any chance of winning.

Under **Family Procedure Rule 12.32** the respondent is expected to file a response using the Forms C7 and C1A (soon to be replaced by C100A) no later than 14 days before the hearing, and the Court may abridge this time if it thinks it is necessary. This will allow her only 2 weeks at the most to read the application, find a solicitor (if necessary) and prepare her response. The Court must forward this response to CAFCASS on receipt.

We would warn you that making an application to the Court sets into motion a course of events which can lead anywhere and become hugely distressing to all parties, but you have to face that. Applications are only made in response to the other party behaving in a manner which is not consistent with good parenting – usually involving the denial of contact – and they have only themselves to blame. It is inevitable that they will react badly to your application; it may even take them by surprise. They will make threats, make false allegations, move house, abduct your children, alienate them against you and abuse them. You have to deal with that in whatever way is most appropriate, often with other applications, for example for a Prohibited Steps Order. You just have to hang in there.

Once it has been made you may only withdraw an application with the permission of the Court. You will thus have to make an application for your earlier application to be withdrawn.

If the Court considers that your application, referred to as a 'statement of case', is without merit and has no hope of success, or is an abuse of the Court process, or has not been made according to the rules, it can reject it. This is called 'striking out' and is enabled under **Rule 4.4** of the Family Procedure Rules 2010.

6.2.8. *Ex parte* applications

In an *ex parte* (Latin for 'by a party') application – also referred to as an 'application not on notice' or **without notice** – you make the application without giving the other side notice or the opportunity to oppose the application, the Court thus hears only one side of the case and makes a decision without requiring all parties to be present and without notice to the respondent. Such applications should be used in emergency situations only.

In practice when you submit your C100 form you must give the other side or their legal representative the opportunity to appear, otherwise you must seek an '***abridged notice***' (i.e. shorter notice than is normal but not *ex parte*) for them to return to Court in 48 hours. You then have to use a '*process server*' to serve the documents on the respondent or their representative so that if they choose not to turn up you have at least served the papers on them.

If you do not provide your full application at the same time as you make your *ex parte* application, you must do so within 48 hours. If you make an *ex parte* application you must pay your **fee**, and you will then have to wait until a judge becomes available. Of course, any decision made will be contested later, and you must be prepared for this.

Ex parte applications are usually made in crisis situations in which the child is at risk, when you need a Prohibited Steps Order, a Specific Issues Order or an emergency protection order very quickly – for example to prevent removal of the child from the jurisdiction, or when a parent fails to make a child available for contact. The order will be made only for a short period, and will invariably be followed by a hearing on notice to review the application. Courts also make *ex parte* orders when the respondent is aware of proceedings but deliberately evades service. *Ex parte* applications are routinely made for Non-Molestation Orders.

Getting an *ex parte* hearing entails going to the Court and waiting to see the duty judge, which can mean hanging about all day so be prepared for a long wait. If the judge won't allow an *ex parte* application he may allow an urgent – i.e. within 48 hours – *inter partes* hearing where both parties are present.
For further guidance look at Re J (Children) (Ex parte orders) [1997] 1FLR 606 and Re S (A Child) (Family Division: without notice orders) [2000] 1FLR 308.

6.2.9. Who should be informed

The following table explains to whom you must give notice of proceedings:

Provision under which proceedings brought	Minimum notice	Persons to whom notice is to be given	Respondents
All applications	See separate entries below.	Subject to separate entries below— Local Authority providing accommodation for the child; in the case of proceedings brought in respect of a child who is staying in a refuge certificated under section 51(1) or (2), the person providing the refuge.	Subject to separate entries below— Persons caring for the child at the time proceedings are commenced; every person the applicant believes has Parental Responsibility for the child; where the child is the subject of a care order, every person the applicant believes had Parental Responsibility immediately before the making of the care order; in the case of an application to extend, vary or discharge an order, the parties to the proceedings leading to the order; in the case of specified proceedings, the child.
All applications under Section 8 of the Children Act 1989	21 days	As for 'all applications' above, and: in the case of an application for a Section 8 order, every person the applicant believes— (i) is named in a Court Order with respect to the same child, which still has effect; (ii) is a party to pending proceedings in respect of the same child; or (iii) is a person with whom the child has lived for at least 3 years prior to the application, unless, in a case to which (i) or (ii) applies, the applicant believes the Court order or pending proceedings are not relevant to the application.	As for 'all applications' above.

S. 4 Parental Responsibility orders, or orders ending a Parental Responsibility agreement; S. 5 orders appointing a guardian, or ending the appointment of a guardian; S.13 applications for leave to remove or change a surname; S.16(6) variation or discharge of s.8 order; S.33(7) applications for leave to remove or change the surname of a child subject to a care order; Schedule 1 financial relief orders; Schedule 2 paragraph 19(1) removal from jurisdiction by LA of a child in care; or Schedule 14 paragraph 11(3) or 16(5) discharge of orders.	14 days	As for 'all applications' above, and: in the case of an application under paragraph 19(1) of Schedule 2, the parties to the proceedings leading to the care order; in the case of an application for the appointment of a guardian, the father of the child if he does not have Parental Responsibility.	As for 'all applications' above, and: in the case of proceedings under Schedule 1, those persons the applicant believes are interested in or affected by the proceedings; in the case of an application under paragraph 11(3)(b) or 16(5) of Schedule 14, any person, other than the child, named in the order or directions which it is sought to discharge or vary.
S.36(1) education supervision order; S.39(1), 39(2), 39(3), 39(4) discharge or variation of care & supervision orders; S.43(1) child assessment orders; or Schedule 3 paragraph 6(3) extension of supervision order, 15(2) extension of education supervision order or 17(1) discharge of education supervision order.	7 days	As for 'all applications' above, and: in the case of an application for an order under section 43(1)— (i) every person the applicant believes is a parent of the child; (ii) every person the applicant believes is caring for the child; (iii) every person in whose favour a Contact Order is in force with respect to the child; and (iv) every person who is allowed contact with the child by virtue of an order under section 34.	As for 'all applications' above, and: in the case of an application under section 39(2) or (3), the supervisor; in the case of proceedings under paragraph 17(1) of Schedule 3, the local education authority concerned; in the case of proceedings under section 36 or paragraph 15(2) or 17(1) of Schedule 3, the child.

Section 31 care & supervision orders; S.34(2), 34(3), 34(4) orders for contact with a child in care; S.34(9) variation or discharge of an order for contact with a child in care; or 38(8)(b) variation of an interim care or supervision order.	3 days	As for 'all applications' above, and: in the case of an application under section 31— (i) every person the applicant believes is a party to pending relevant proceedings in respect of the same child; and (ii) every person the applicant believes is a parent without Parental Responsibility for the child.	As for 'all applications' above, and: in the case of an application under section 34, the person whose contact with the child is the subject of the application.
Section 43(12) variation or discharge of child assessment order.	2 days	Those of the persons referred to in section 43(11)(a) to (e) who were not party to the application for the order which it is sought to have varied or discharged.	As for 'all applications' above.
Section 25 placing of a child into secure accommodation; S.44(1) emergency protection order; S.44(9)(b) variation of contact with child under emergency protection order; S.45(4), 45(8), extension or discharge of emergency protection order; S.46(7) emergency protection order for child while in police protection; S.48(9) warrant allowing police to use reasonable force to discover whereabouts of child; or S.50(1) recovery order.	1 day	As for 'all applications' above, and: in the case of an application under section 44(1), every person the applicant believes to be a child; in the case of an application under section 44(9)(b)— (i) the local authority in whose area the child is living; and (ii) any person the applicant believes is affected by the direction which it is sought to have varied.	As for 'all applications' above, and: in the case of an application under section 44(9)(b) (i) the parties to the application for the order in respect of which it is sought to vary the directions; (ii) any person who was caring for the child prior to the making of the order; and (iii) any person whose contact with the child is affected by the direction which it is sought to have varied; in the case of an application under section 50, the person the applicant alleges to be responsible for the taking or keeping of the child.

CHAPTER 7: EVIDENCE

Call me old-fashioned, but weren't we brought up to believe the courts relied on something called 'evidence' to make their decisions? Instead family courts operate on the basis of something called the 'balance of probability, i.e. you are innocent until proven to be the father.

Matt O'Connor[271]

7.1. Types of Evidence

The Family Court exercises complete control over what evidence can be presented and how it is presented; if it chooses it can exclude evidence which you think should be admissible (Family Procedure Rules 2010, **Rule 22.1**).

Family Courts are inconsistent when it comes to evidence. Judgements are made not on the 'beyond all reasonable doubt' standard of the criminal courts but on the civil court balance of probabilities. Hard evidence upsets this balance. If you present incontrovertible evidence to the Court which you have legitimately obtained by recording a conversation or a CAFCASS interview, for example, or though the services of a private investigator, it will be considered underhand and inappropriate.

- Most evidence will be in the form of written witness statements and affidavits (Form E is a type of affidavit). Letters from the children involved may also be given in evidence.

[271] Matt O'Connor, *Fathers 4 Justice: the inside story*, Weidenfeld & Nicolson, 2007

- Parties and witnesses will also give oral evidence which gives other parties the opportunity to challenge their written evidence – body language and demeanour then form part of the evidence.

- Factual evidence can be presented in the form of DNA and hair strand test results, hospital and medical records, letters from GPs. Other evidence may also be presented such as video and audio recordings, print-outs of text messages and emails and print-outs from social websites. You may also wish to present press articles or academic research.

- Non-factual evidence can be presented in the form of written opinions and reports from CAFCASS, social workers, child psychologists and other 'experts'. These people may also be called upon to give oral evidence. Sometimes organisations such as Women's Aid will present reports unsolicited by the Court.

Evidence will not be requested at hearings lasting only an hour or half an hour, such as directions hearings or conciliation appointments. The most common types of hearing for which evidence will be requested are fact-finding hearings and final hearings.

You must seek the Court's permission to introduce evidence, and if the other party objects the Court will have to deal with this first. All evidence must be filed (a copy to the Court) and served (a copy to all other parties). Don't try to wrong-foot the other party by introducing evidence on the day – 'ambushing' – the Court will not allow you to use it. Or the case may be postponed and you will have to pay costs. All parties must be given time to read all documents and consider them properly.

7.2. Your Evidence

7.2.1. Position statement

At the first, or 'directions', hearing the judge may direct you to prepare a Position Statement. This is where you set out your case to the Court. It will form part of your 'bundle' and the judge should read it before the next hearing. If you are very lucky they will read it the night before, otherwise on the morning of the hearing. You do not have to produce a position statement but it will help you to do so.

In your Statement you must not put what *you* want but what is in your child's best interest. Remember that the Children Act gives no rights to parents, so do not refer to your rights, however much you think they are being abused. Let the Welfare Checklist guide you – make sure you cover each point. The purpose of the Statement is to give the judge an understanding of the dispute and an indication of what you, as the applicant, want the Court to do in order to resolve it.

Provide a brief summary of when you met your former partner, when you cohabited/married, and when the child was born. State briefly when and why you separated.

- Add some brief detail about your relationship with your child, the things you enjoy doing together, your level of involvement in childcare and schooling and in after-school activities. Give details of what contact has been like since separation and the benefits your child has got out of it – i.e., he is able to socialise with his

friends and with your family, and to build a loving relationship and bond with you.

- State why you are requesting the Court's assistance and what order you want the Court to make including details of parenting time. Detail any Court Orders already in place. The wording of the order has to be specific, this is what makes the order enforceable; make sure that you are absolutely clear about what you want, otherwise you stand no chance of getting it. Put everything you want into your application; you do not want to pay the fee twice.

- Regardless of the type of order you are applying for emphasise that you do not want your child to view you as just a part-time parent and that you want to be around and have an equal part to play in all aspects of your child's education and upbringing. Use some of the Court precedents listed in this e-Book which are relevant to your case and refer to the research on the importance for children of having involved fathers.

- You can attach the full text of such documentary evidence to the Statement and list it as evidence. We'll show you how to do that shortly.

- If false allegations have been made against you use this opportunity to show that these have been fabricated. Do not fill your statement with endless pages rebutting all the lies, but do be clear that what you have presented is a sample. Prepare a separate rebuttal to the rest of the lies and have it with you in Court should you need to bring it out (with a sigh to the judge: 'I was hoping to avoid a waste of time, your honour …').

- If you think the respondent has mental health issues, state these briefly and provide evidence: incidents, treatment, medication and the effects on your children. If you cannot provide evidence you will merely come across as spiteful.

Generally your position statement should be short and punchy – no more than two or three sides of A4 for your first one: keep it more like a business presentation: clear, precise and easy for the judge to read. Judges habitually don't bother to read statements, so if it is kept short it is more likely to be read. Use bullet points; help him to get to the salient facts quickly. Keep your paperwork to a minimum.

Some people suggest including a photo of yourself with your child; this can give an otherwise anonymous child who is not present in Court a presence and credibility, and may help concentrate the judge's mind on his welfare.

You may also want to attach short, one page statements of support from family members. Keep such statements relevant, if they are not essential, don't use them, and bear in mind that if the case goes to a contested hearing the writer may be called to be cross examined. If you must have pages of detail, rebuttals, etc., put them in as appendices. Too many people produce a long turgid statement; the judge has to navigate through irrelevant rubbish to find the important bits – **help him to find what you think is important**.

Later in a case if there are particular problems it may become necessary to make further statements in which you employ much greater detail, but you will know when the time comes. Remember that the one overriding consideration at all times must be the child's welfare, and refer to the 6 principles of the **welfare checklist** in the Children Act to help you.

Say nothing which might make you appear vengeful, malicious or petty; you must keep in mind that the respondent's lawyers will attempt to show you are only doing this to be vindictive, that you are being controlling, want to avoid paying child support or that you still want a reconciliation and cannot accept the relationship is over. These allegations are common and you must not make it easy for them to be made; you should also have rebuttals ready if they *are* made.

Say nothing you cannot prove with solid evidence.

Don't be tempted to produce a narrative in which you play the part of the victim; your child is the only victim here. Equally, don't cast yourself as the hero, and don't portray your ex as some sort of villain: they are misguided, mistaken, hurt, perhaps failing to put the interests of their children first, but not villainous. As humans we are natural story tellers; try to control the impulse. Avoid anything likely to produce the story-telling response in your ex; you don't want to be cast as the villain yourself!

The rules under which statements must be produced are strict and are explained below. The format must also follow convention; the heading will look something like this:

WE ARE FAMILY
WE ARE FATHERS4JUSTICE™

Applicant.....
Statement No.....
Date Sworn.....
Date Filed.....
Exhibits.....

(*These spaces are completed by the court*)

IN THE (*Give the name of the court*) **COURT** **NO. OF MATTERS:** (*Put your case number here*)

IN THE MATTER OF (*Put the full name of your child as it appears on the birth certificate here*) **Born** (*Put your child's date of birth here*)

BETWEEN:

(*If you are the applicant, put your full name here*)

APPLICANT

AND:

(*If your children's other parent is the respondent, put her full name here*)

RESPONDENT

_____

FIRST (or second, etc.) **STATEMENT OF APPLICANT**

_____

(*Your full name*) **of** (*Your full address*) **WILL SAY as follows**:

(*Give a brief history; for example*:)

1. I make this Statement in response to the Respondent (*mother or father*), (*his or her name's*) refusal to obtemper the Contact Order made in this (*or another*) court on (*date of the order*) in respect of our son (*or daughter*), (*full name of the child*) born (*child's date of birth*) now aged (*child's age*).
2.
3.
4.

(*Describe the current position*)

5.
6.
7.

(*Outline the order you are asking the Court to make*)

8.
9.
10.

In the first section you give a little history and explain what order – if any – is already in place. If you refer to orders give the case numbers, the court in which they were made, and the date. In the second section you explain what is currently going on, and what contact you are getting – if any. If the other parent has stopped contact, state that, and the date at which contact stopped.

Finally you state the order you wish the Court to make and the parenting time you wish to be given and arrangements for handover. If contact has stopped you should ask that the Court orders interim contact. All paragraphs must be numbered and everything must be double-spaced. At the end of your statement you close it like this:

Applicant.....
Statement No.....
Date Sworn.....
Date Filed.....
Exhibits.....

I make this Statement believing the contents to be true and understand it will be placed before the Court in evidence.

Signed ….…… (Put your full name here)
Dated : (Put the date here)

Position statements from both parties need to be filed to the Court simultaneously so as to avoid an endless exchange of allegations and counter allegations. Statements will always be seen by the other side so avoid anything provocative. Courts are notoriously lax about letting resident parents file statements late, which means they have already seen yours and responded to it by adding a few more lies or false allegations.

Refuse to file a statement at all unless both sides do so simultaneously.

7.2.2. Affidavits & statements

An affidavit is a statement of a fact or of facts. The name is Latin for 'he has declared upon oath'. Many affidavits can be downloaded as forms from the **Ministry of Justice** website. The rules for completing and filing affidavits and witness statements are provided in the associated **Practice Direction 22A**. Although these rules are strict (note the prescribed paper quality and margin width), it seems unlikely that minor variations will result in the rejection of documents, particularly if you are a Litigant-in-Person.

Format

Affidavits and statements must be headed with the title of the proceedings and identification of the parties (see the example above).

The affidavit or statement must be produced on good quality paper and formatted with a margin of 3.5 cm. It must be fully legible and printed or typed in double spacing on only one side of the paper.

The sheets must not be stapled together and each page should carry the case number and your initials and (in the case of affidavits) those of the person before whom it was sworn.

The pages and all paragraphs must be numbered.
Any numbers, including dates, must be spelt out.

If you reference any documents you must put your initials in square brackets at the end of the paragraph in which you make the reference and give the document a number, for example, **[AB1]**, **[AB2]**, etc. The documents will also be numbered **[AB1]**, **[AB2]**, etc.

Body

You must write the affidavit or statement in your own words and in the first person.

An affidavit should begin, "I (full name) of (residential address) state on oath..."

A statement should begin, with your full name and home address. Under **Rule 29.1** you do not need to reveal your address or contact details if you do not wish to, unless the Court directs otherwise.

In adoption proceedings in which a serial number has been assigned you should word the affidavit so that the applicant is not identified.

You should distinguish between statements you know to be true and those you believe or understand to be true, giving the source of the latter.

You are encouraged to write a statement in chronological order.

Alterations

If you make any alteration to a statement or affidavit you must initial it. Alterations to affidavits must also be initialled by the person before whom it is sworn. If the document has not been initialled in this way it may only be used in evidence with the Court's consent.

Swearing an Affidavit or Verifying a Witness Statement

At the end of an affidavit is a statement stating that the contents of the affidavit are true. This is called the 'jurat' (Latin for 'he swears'). You must sign this. It must also be signed by the person before whom it is being sworn and he must print his name, full address and qualification below his signature.

There must be no space between the end of the affidavit and the jurat, and the jurat must not be on a separate page. This ensures that no one can add anything after it has been signed, sworn and witnessed.

An affidavit may only be sworn before:

- a Commissioner for Oaths (Commissioners for Oaths Acts 1889 and 1891);
- another person specified by statute (sections 12 and 18 of, and Schedules 2 and 4 to, the Legal Services Act 2007);
- certain officials of the Senior Courts (section 2 of the Commissioners for Oaths Act 1889);
- a circuit judge or district judge (section 58 of the County Courts Act 1984);
- any Justice of the Peace (section 58 of the County Courts Act 1984); and
- certain officials of any County Court appointed by the judge of that court for the purpose (section 58 of the County Courts Act 1984).

The person before whom it is sworn must have no other involvement in your case.

You must end a witness statement as follows:

"I believe that the facts stated in this witness statement are true."

If you make a false statement of truth the Court may start proceedings against you for contempt.

In adoption proceedings in which a serial number has been assigned the signature of the applicant will be removed before service on the other party so that the applicant is not identified.

Filing

The affidavit or witness statement must be filed in the court or court office in which the proceedings in which it will be used are taking place. So you can't just take it to your nearest court.

7.2.3. Exchanging statements

When the respondent receives a copy of the petitioner's statement they will need to respond by producing one of their own. If you are the applicant you should not need to do anything until you reach Court. You can respond to their statement, but there is a danger of escalating a dispute through allegation and counter-allegation, which is why it is best if statements are filed and exchanged at the same time.

If the other party's solicitor won't copy their statement to you it is likely they are deliberately delaying so that they can 'ambush' you (see **Glossary**) on the day in Court. If the judge has ordered that the statement is in by a certain date and they have exceeded that date,

return to Court and get the duty judge to enforce the order. If you just wait until the day they will only get their wrist smacked and you won't have had a chance to prepare your case.

You will need to ask the Court to issue a Witness Summons; this can be used to 'require a witness to attend court to give evidence, to produce documents to the court, or both'. The summons is made using **Form N20** and guidance is available in **Leaflet EX342**; the form must be filed at least 7 days before the hearing and served on the witness at least 4 days before. You will have to pay a **fee**. Two copies of the summons should be filed with the Court.

7.2.4. Documentary evidence

In addition to position statements and affidavits other documentary evidence can be presented to the Court, such as reports by expert witnesses and transcripts of interviews with your children, who will not normally attend Court.

If you present case law to support your argument the case must be clearly referenced and the paragraphs must be numbered.

Documents you are presenting as evidence must be attached to your position statement and referenced within it. Each document is an 'exhibit' and must be numbered; see the guidance above.

Manner of Exhibiting Documents

If you attach a document to an affidavit it must remain separate – don't print it on the same sheet of paper.

You must show it to the person before whom the affidavit is sworn and he must identify it through a written declaration which must be headed with the title of the proceedings and identification of the parties.

At the top right-hand corner of the first page there should be clearly written:

- the party on whose behalf it is made (i.e. you);
- the initials and surname of the maker (i.e. you or someone giving witness testimony on your behalf);
- the number of the affidavit/statement in relation to its maker (this will depend on your position statement and the order in which you introduce your evidence);
- the identifying initials and number of each exhibit referred to (i.e. **[AB1]**, **[AB2]**, as described above); and
- the date on which it was made.

This information must be repeated on the backsheet.

If you make more than one statement or affidavit to which you have attached exhibits, the numbering of the exhibits must be consecutive. So if there are three exhibits attached to your first affidavit – **AB1**, **AB2** and **AB3** – the first exhibit attached to your second affidavit must be numbered **AB4**, and so on.

Letters

Copies of individual letters should be collected together and exhibited in a bundle or bundles. They should be arranged in chronological order with the earliest at the top, clearly numbered and firmly secured.

When such a bundle of letters is exhibited, the bundle should have a front page attached stating that the bundle consists of original letters and copies.

Other Documents

You may exhibit photocopies as long as you make the originals available for inspection by the other parties in advance of the hearing and by the judge at the hearing.

You should not exhibit court documents.

As with letters, if an exhibit is formed of more than one document you must attach a front page listing and dating the documents.

Exhibits other than Documents

If you exhibit items other than documents they must be labelled securely so that the label cannot come off. Small items can be placed in a labelled container.

General Provisions

Where exhibits contain more than one document or letter they must not be stapled together, but be fastened in a way which does not hinder reading (such as treasury tags). The pages should be numbered consecutively at bottom centre.

If any documents are hand-written or otherwise difficult to read you should provide a clearly typed transcript, carrying the same page number as the original, but with an 'a' beside it.

Where affidavits, statements and exhibits are very numerous you can present them in a separate 'bundle' or file, provided that they are all numbered consecutively.

If service to all other parties is prohibitively expensive or impracticable due to the bulk of documents you can request that the Court makes a direction for alternative arrangements to allow the parties to view them.

These rules may seem pedantic, but your job in following them is to provide the judge with all the information he needs to decide your

case, arranged in a format and order with which he is familiar, in such a way that no court time is wasted trying to hunt down a vital page of evidence. You should do all you can to keep the judge on your side, and a neat, well-presented bundle is essential.

7.3. Factual Evidence

7.3.1. Hair strand tests

A fashionable allegation is that you habitually take drugs or abuse alcohol. If this allegation is made the Court will need to deal with it before proceedings can continue.

Accordingly the Court will make a direction that you undergo a 'hair strand test'. Most such tests are performed as part of family law disputes, and the majority show that the allegations which led to them were false. It is common that the Court will make other directions as well at this stage, such as a welfare report. Refusing the test looks as if you have something to hide, but you might suggest that whoever makes the allegation would like to pay for the test.

A hair strand test takes about 50 hairs from your head (or elsewhere on your body if there is no hair on your head) and tests them for evidence of drug or alcohol consumption. The advantage of such a test is that whereas a urine test will only reveal drug use in the last 48-72 hours, a hair strand test will reveal use over at least the last 3 months (depending on the length of your hair). It can therefore distinguish between recreational and habitual drug users. It will also provide conclusive proof if you have *not* been taking drugs, and this will cast doubt on the veracity and motivation of whoever has made the allegation.

Hair strand tests can detect up to 63 different drugs and metabolites (the chemicals produced as a result of drugs being metabolised in your body).

It is tempting to get a haircut if a hair strand test is ordered and you are worried about what it will reveal, but it will obviously be a bit of a giveaway. If you have shaved your entire body you may be ordered to provide observed urine tests twice a week for 3 months. Not a good day out.

Some companies and internet sites offer cleansing solutions which are claimed to remove the evidence from your hair. There is some indication that they work for alcohol but they do not work for other drugs. The testing company will wash the hair anyway, to eliminate external contamination.

The public law case **London Borough of Richmond v Others [2010] EWHC 2903 (Fam)** established the limitations of hair strand testing,

- A hair strand test should only be used as part of the evidential picture. Where alcohol consumption is shown to be very high the test might form a significant part of the evidence but generally a hair strand test should not be used in isolation to justify a significant decision about a child.

- The two tests used – ethyl glucuronide (EtG) and fatty acid ethyl esters (FAEEs) – can produce conflicting results, therefore both tests should be used. The tests must be performed to the ISO 17025 standard.

- In 2009 the Society of Hair Testing established a minimum level – based on a 3cm segment of hair closest to the head – above which alcohol consumption is considered chronic and excessive; the tests should only be used to determine whether or not results are consistent with excessive alcohol consumption. Below that level it is not possible to determine whether the results are indicative of social drinking or abstinence. 10% of results will give a false positive.

- The 3cm segment may be divided into 3 1cm segments to indicate a trend in drinking, but there is insufficient published data to establish peer-greed minimum levels.

7.3.2. DNA tests

7.3.2.1. Taking the test

A DNA test is directed by a court to determine whether or not a putative father is the biological parent of the child subject to proceedings. Depending on the nature of the proceedings the mother may be trying to prove either that the putative father is the biological father or that he is not.

Under **Section 20** of the Family Law Reform Act 1969 the Court has discretion to direct a test of blood or other bodily samples on its own motion or on application by a party. The child's welfare is not the paramount principle (orders are not made under the Children Act); the principle is provided by S v S; W v Official Solicitor [1970] 3 ALL ER 107,

> *The court in ordering a blood test in the case of an infant has, of course, a discretion and may make or refuse an order for a test in the exercise of its discretion, but the interests of other persons other than the infant are involved in ordinary litigation. The infant needs protection but that is no jurisdiction for making his rights superior to those of others.*

The Court cannot order a DNA test other than in the context of other proceedings, so if you want the Court to order a test you will either need to make a Section 8 application for contact or residence or request it through the CSA. The issue of paternity will then have to be settled before proceeding.

The Court is able to make an order for a DNA test involving samples other than blood (cheek cells are the usual samples taken) by the Blood Tests (Evidence of Paternity) Amendment Regulations 2001, but again it cannot force you to take the test, and the case of Mikulic v Croatia [2002] FCR 720 established that it may be a violation of one person's rights to compel him to undergo a paternity test simply so that another person can establish their identity.

Consent must be given by all parties aged 16 and over, and if your child is under 16 consent must be given by someone who 'has the care and

control' of the child, i.e. with Parental Responsibility. If consent is withheld then under Section 20 of the Family Law Reform Act 1969 amended by the Child Support, Pensions & Social Security Act 2000 the Court can order that the test take place if it considers that to be in the child's best interests. In the UK it is almost always considered to be in the interests of justice to know the truth and not to suppress evidence, and in the child's best interests to know who his father is.

Ensure that the test is carried out by a reputable company such as **Cellmark** and not one with a name like WhozTheDaddy? Only the results from an approved company will be accepted by the courts, and they guarantee that your data is secure and will not be passed to third parties, and that they will destroy your DNA sample after three months. A list of accredited testers is available from the **Ministry of Justice website**.

The court-approved process is simple: you first arrange an appointment for the test with your doctor or practice nurse; the testing company will send your doctor a sampling kit, and at the appointment your doctor will take a swab of cells from inside your mouth which he will then transfer to a test card and send off to the company. When the company has received all the samples they will analyse them and send the results out to you or to your solicitor.

You will have to take a passport type photograph with you to the doctor and complete and sign a form which will then go off to the company with the photograph and sample. This is to ensure that the sample really comes from you.

The test is extremely accurate (inclusive tests quote a 99% accuracy, exclusive tests quote 100%) and is probably impossible to cheat. If the child is not the father's and the father wants to prove that he is he obviously can't. If the child is the father's and the father wants to prove he isn't he could send a friend to the test, but the photo would give him away when the mother receives her copy. If the mother wants to prove a man is not the father she could take someone else's child, but then her DNA would not match the child's, and even if her doctor were complicit, the testing company would reject the result.

7.3.2.2. *What if the result is positive?*

If the result of the test is positive and shows that you are the father your responsibility is to the child, not merely financially to pay child support, but also to be an involved and committed parent. If the mother wishes to obstruct that you must resist; it is not for her to deny her child a father.

If you are not on the Birth Certificate, you can apply for a Declaration of Parentage under the Family Law Act 1986, and the Court can order the Birth Certificate to be amended. The criterion is that this must be in the best interests of the child. For child support cases you can apply for a Declaration of Parentage under Section 27 of the Child Support Act 1991.

7.3.2.3. What if the result is negative?

You should be aware that a negative result is delivered in the bluntest manner possible: you will simply receive a letter with the two words 'Paternity Excluded', plus a brief page of notes and a technical printout. No one can prepare you for the shock, the dismay, and the grief. Nor can they prepare you for the catastrophic consequences. We strongly advise you to have counselling lined up for this eventuality.

If the test shows you not to be the father and if a subsequent test shows that another man is, he then becomes the child's legal father, regardless of whether he wishes to be, and of your involvement up to that point. You will then need to apply to the Court for a contested Shared Residence Order which is the only way you can re-acquire Parental Responsibility: you cannot apply for a Parental Responsibility Order; the Court will decide according to the child's best interests. You can only apply for a Residence or Contact Order, however, if the child has lived with you for a period of at least 3 years or if you were married and the child was regarded as a child of the family.

Recent decisions in shared residence cases such as **Re A (A Child: Joint Residence/Parental Responsibility) [2008] EWCA Civ 867** – cited below – show that the courts can be sympathetic towards a father who has been the victim of paternity fraud:

> *The fact is, Mr A is not H's father or parent either in common parlance or under any definition contained in the Children Act or other legislation. He is not a father by biological paternity or adoption, nor a stepfather by marriage. He is a person entitled, by reason of the role he has played and should continue to play in H's life, to an order conferring Parental Responsibility upon him. He is thus a person who, jointly with the mother, enjoys the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to that child (see s.3 (1) of the Children Act 1989) but he does not thereby become the father of that child.*

7.3.2.4. Refusing a DNA test

DNA testing has let the genie out of the bottle and he cannot be returned. Although the Court cannot force you to be tested we would recommend that you consent to the test.

If it is alleged in the context of a marriage that you are the father of a child this is the most natural thing in the world and it is highly unlikely you will have any reason to doubt that you are, indeed, the father. If you are in any doubt, because there has been a history of adultery, for example, we would strongly advise that you have a DNA test done as soon as possible, before you bond fully with your child, in order to avoid grief and devastation later.

If you are not in a relationship with the mother and are being pursued for child support and you doubt you are the father you are also advised to seek a test: there is no reason why you should pay for the upkeep of a child who is not yours, particularly if you have no contact with the child; one in five men named in child support cases turns out

not to be the biological father.[272] It is important to establish who is the child's father, so that he can meet his responsibilities, have the option to be involved in the child's life, and so that the child can have the chance of knowing his or her father.

The issue will also arise in the context of a contact dispute where, in order finally to prevent contact, your ex will allege that you are not the biological father. This is very much a last-ditch endeavour to scupper your chances of contact, since it will mean your ex will lose any child support you are paying. You could argue that the result is immaterial; the child is a 'child of the family' and will be no less loved and valued if the result is negative. This is naïve: most fathers report that in these circumstances, even with the best will in the world, their relationship with their child changes.

Either your ex knows damn well you are not the father and has always known, or she is employing a delaying tactic. If the latter, then you could refuse, but it is almost certain that the Court will not proceed until the matter is resolved. Alternatively it will interpret your refusal to mean that you are not the father (or that you are if it is a child support case) and proceed accordingly. Is ignorance bliss? We doubt it, but neither is the knowledge that your child whom you have believed, perhaps for many years, to be biologically yours is in fact not.

There are various arguments against testing – that it will destroy the family, distress the child, etc. – but in the end the decision is not really yours to take; your ex has effectively already taken it, and you will have to comply with the Court process. What we do advise is that counselling is lined up for you and for your child in the event that the result is negative. Such a revelation will be devastating.

For further discussion of this issue, see our section on **Paternity Fraud** in Chapter 3.

7.3.3. Recorded evidence

It is possible to present recordings of various conversations to the Court as evidence. Be careful what you submit, however, as recorded incidents can be stage-managed and children can be manipulated, and if a party is recorded without their knowledge this may reflect badly on you. You are advised not to submit recordings of your children or your ex. It is also possible to submit video footage at a hearing.

Recordings of police interviews may also be submitted, and video recordings of interviews with children.

Generally you need to have any recording transcribed into a document and to present that as evidence (see above); keep a duplicate of the audio file or tape to present to the Court if necessary. There is software available which will transcribe speech into text, though you should check the results carefully! There are also services available on the internet which will do this for you.

Always make sure that you keep copies of any audio or audio-visual material you submit. It is common for material to get 'lost in the post'.

[272] Figures obtained from the CSA for 2007-08 reveal that 661 out of 3,474 tests named the wrong man.

Some parents have been banned from recording conversations under a Non-Molestation Order, but this would seem beyond the scope of the legislation as recording a conversation cannot be molestation, it is simply a record, as writing the conversation down from memory would be. Such a ban prevents evidence being presented in Court and allows the other party to lie about the content of the conversation.

If you are going through a potentially hostile separation you are advised to invest in a digital voice recorder and to record conversations with your ex, solicitors, CAFCASS, etc. You will encounter expert witnesses, lawyers, CAFCASS officers and others lying, particularly when they think they are not being recorded; a tape recording can be devastating when produced in court, and can also be used as the basis for perjury and perversion of justice prosecutions. If you haven't been recording conversations and interactions already, you must start now, and record handovers on a camcorder.

7.3.4. Email, texts & Facebook

If presenting Short Message Service (SMS or 'text') exchanges or emails you will need to print off the whole exchange and not just an individual message.

Be aware that CAFCASS monitor Facebook and may use your posts against you. If you seek advice on Facebook-based sites such as **Fathers 4 Justice** you should do so anonymously. Do not take your disputes to sites on which your ex is already a member.

Don't reveal anything on Facebook you wouldn't want presented in Court, and be aware of the rules on confidentiality.

7.4. Non-Factual Evidence

7.4.1. Section 7 reports

In most cases the **Schedule 2** investigation by CAFCASS will be sufficient, but in a case where any question concerning the welfare of the child has arisen **Section 7** of the Children Act 1989 allows the Court to request from CAFCASS a further report which will assist the judge in understanding the case and in making an appropriate order. If allegations have been made the Court may want to determine the veracity of these through a **finding of fact hearing** before ordering a welfare report.

The writer of the report will interview you and your ex, your children and possibly other adults. Because of the crisis within CAFCASS in 2009 the President of the Family Division issued emergency guidance[273] which instructed courts to ensure that s.7 reports were no longer requested in general terms. Instead, they should address one

[273] *Agreement between the President of the Family Division, Ministry of Justice, HMCS, Department for Children, Schools and Families and Cafcass*, 30 July 2009, http://www.familylaw.co.uk/images/Teasers/Interim%20Guidance%20for%20England%20-%2030%20July%202009.pdf

or more specific questions which must be recorded on the order; these are governed by **Rule 12.6(c)** of the Family Procedure Rules 2010. Full reports examining every factor on the welfare checklist should seldom be used, and come under Rule 12.6(d). The timeframe for reports is,

- Within 6 weeks for a single issue;
- Within 6-12 weeks for two or more issues, depending on complexity.

The emergency guidance – originally intended to last only 6 months – ended in September 2011, though the 'spirit' of the agreement is expected to continue.

The reality is that CAFCASS is still delivering reports late; six months or more is not unusual. Once the due date has passed you must badger CAFCASS incessantly until you receive it: they are violating the 'no delay' rule. If necessary, make an official complaint (see below). Talk to the CAFCASS Family Court Advisor about arranging interim contact while you wait for the report.

If allegations have been made CAFCASS may well want to wait until the outcome of a **fact finding** before preparing a report.

Don't accept the arranged hearing date unless you have had ample opportunity to study your report and to discuss it with your legal advisors. You may need to request an alternative date for the hearing. If you are still using a solicitor (why?) you must make sure he or she passes the report on to you. It should be taken into account, but the judge always has discretion whether or not to do so. If he does reject it he should give his reasons.

Reports vary enormously in scope and quality; an unacceptable number are deemed inadequate. Judges may choose, politely, to ignore them. Sometimes they will spell out the report's flaws in Court; very occasionally they will send a copy of their judgement to CAFCASS or social services so that their concerns may be acted upon.

Some of the worst reports are prepared by social services who are now – due to the crisis – producing the majority of s.7 reports; these are often superficial and simplistic, and show ignorance of correct procedure, substituting inappropriate criteria for the welfare checklist. They are influenced by a care-based mind-set in which children are already displaced from their parents.

CAFCASS grew out of the old Probation Service; their reports are a throwback to the old welfare reports, and thus make the presumption that there are welfare issues to be addressed and that the child is potentially at risk from one parent – normally the father. The primary focus and remit of Probation Service staff had been to work with disadvantaged, dysfunctional and criminal families at the very margins of society.

CAFCASS staff have never, to our knowledge, been re-trained specifically for domestic, i.e. 'normal' families going through a divorce and the related court work; nor have they been assigned it as an option once their training is completed.

Many non-resident parents find that Section 7 reports are weighted heavily in favour of the resident parent, and are given too much credence by the Court. They are difficult to challenge in proceedings, and the report's author can only be cross-examined if the Court orders it.

There is a widespread belief that the Court can only order a Section 7 Report from CAFCASS with the consent of both parties, and that you can therefore refuse a CAFCASS report. This belief is false. Having said that, parents who have refused to cooperate with CAFCASS reports on the grounds that CAFCASS are partial or incompetent seem to have done so with impunity and even some success.

Observe also that under Section 7(3) a welfare report can be made orally rather than in writing. This means that instead of receiving the report before you go to Court, you may only hear from the CAFCASS advisor outside, just before you go in. It can also mean that what the FCA tells you outside the Court may differ from what she tells the other party or from what she says in Court.

We don't want to dishearten you unduly, but you need to know the score; if you are a parent taking your case through the Family Courts, desperately waiting for that all-important Section 7 report which – you hope – will at last give you the result for which you have been waiting many months, it is pretty alarming to learn that it will be written by some untrained, unqualified, illiterate who cares more about pursuing their particular political ideology than about your children.

We really cannot emphasise too much that the family justice system is grossly dysfunctional and in terminal crisis, once again we advise you to avoid Court unless it is absolutely inescapable; you will almost certainly come to regret it.

7.4.2. The s.7 template

To guide their staff CAFCASS prepared a template for Section 7 reports. Full Section 7 reports should now be rare, since courts should be ordering reports only into specific issues, but the full template gives you an idea of what CAFCASS are looking for and how they work:

cafcass
Putting children first in family courts

Section 7 (Children Act 1989) Report
(With guidance included in bullet points)

Court:

Court Case Number:

Confidentiality

This report has been prepared for the Court and should be treated as confidential. Subject to rules of court it must not be shown nor its contents revealed to any person other than a

party or a legal adviser to such a party. Such legal adviser may make use of the report in connection with an application for public funding (legal aid).

Concerns

Significant factual errors (not matters disputed by the parties) in this report should be referred to the report writer or their manager. Concerns about other aspects of the report (for example, the extent of the enquiries, the opinions expressed in it or matters disputed by the parties) must be addressed in court. If any of the parties requires the Children & Family Reporter to be questioned in court, they must (through their solicitor, if they have one) immediately ask the Court to order the Children & Family Reporter to attend.

CHILD(REN) SUBJECT TO THE APPLICATION

Forename	*Family Name*	*Gender*
DoB	*Age*	*Ethnic Origin*

- *Use the categories on the Diversity Monitoring Form here. A more detailed description of the child(ren)'s and parties' ethnic origin and cultural background can then be given in the report under the headings 'Children' and 'Parties'.*

Living with (name and relationship to the child):

- *If there are several children and they are not all living together, please specify which children are living with whom. Indicate if the child or children are living with the applicant or the respondent. Consider whether or not the circumstances of the application indicate that the addresses of children, applicants or respondents should be omitted from the report.*

PARTIES TO THE PROCEEDINGS

Applicant

Forename	*Family Name*	*Relationship to Child*
DoB	*Ethnic Origin*	

Respondent

Forename	*Family Name*	*Relationship to Child*
DoB	*Ethnic Origin*	

Any Other Significant Persons

Forename	*Family Name*	*Relationship to Child*
DoB	*Ethnic Origin*	

- *If there are no other significant people, this heading can be deleted.*

Application before the court:

- *If necessary, state which child the order relates to.*

Filing Date for Report:

Date of Next/Final Hearing:

Date of Children & Family Reporter Appointment to Case:

Children & Family Reporter:

Qualifications:

Office Address:

Telephone Number:

Contents: *A list of contents can be included if required by the length of the report.*

- *Some issues could be covered under several headings in the report. It is at the discretion of the practitioner to use the appropriate heading, depending on the circumstances of the child.*

1. MATTER BEFORE THE COURT

- *Nature of the proceedings.*
- *Brief statement on issues agreed and disputed, if known.*
- *Mention of previous reports completed in the case.*
- *History of court proceedings if known.*

2. BACKGROUND

2.1 Enquiries Undertaken

- *Interviews and dates, location if appropriate. Specify if face to face or telephone contact, if anyone else was present, and location if appropriate.*
- *Telephone calls.*
- *Use of interpreters.*
- *Dates and location of meetings with the child.*
- *Interviews/observations of child, including within contact sessions.*
- *Reasons if the child is not seen, or if not interviewed about their wishes and feelings.*
- *Attendance at meetings with other professionals.*
- *Documents read – state that the Children and Family Reporter has read all relevant documents.*
- *Any known statements, documents or reports that had not been received at the time of writing the report.*

- *Any other relevant enquiries, including checks made, and any other previous involvement by other agencies (Social Services/Child Protection Register, Schools, Health, Probation, Police).*

- *Any significant people not interviewed and reasons why.*

- *Use of genogram or family structure may be included or a cross-reference made to one in another statement.*

2.2 Child(ren)

- *Observations of child and relationship with each parent.*

- *The child's ethnic origin, religion, language and cultural background.*

- *Any disabilities.*

- *Any special needs.*

- *Disabilities and special needs only need to be addressed if they are relevant to the individual child (or party, under the next heading). There is no need to use negative statements (i.e. 'no special needs, no disabilities') unless this is considered to be relevant information to the court.*

- *Information about the child's home environment, schooling and health.*

- *Description of the family relationships.*

- *How much does the child understand of the proceedings and of the Children and Family Reporter's role and involvement?*

2.3 Parties

- *Description of the dispute (as it affects the child and of the steps taken during the enquiry to help reduce and manage conflict/tensions).*

- *Position of the parties (brief history of relationship and current circumstances).*

- *Ethnic origin, religion, language and cultural background (unless these points are already covered under the previous heading about the child(ren).*

- *Any disabilities, health issues.*

- *Any special needs.*

- *Other relevant issues to bring to the court's attention (such as domestic violence, child abduction, disruption during contact, allegations of abuse, referrals to Social Services, health, education, criminal conviction details, etc.).*

- *Summary of history of any Family Court proceedings, previous CAFCASS involvement and any subsequent court developments, e.g. findings of fact.*

- *Existing arrangements for residence and contact.*

- *Views about and reason for the application.*

- *Proposals and specific concerns/allegations with any evidence.*

- *Use of assessment tools (e.g. parenting plan) if appropriate.*

2.4 Any Other Relevant Information

(This heading could be removed from the report if none of the listed or any other relevant issues are present)

- *Significant other people (describe involvement), e.g. new partners, grandparents, older siblings, etc.*

- *Other agency involvement.*

- *Expert's reports, including any disagreements between experts (can be included as separate section if appropriate). Comments by the Children & Family Reporter on the expert reports.*

3. Welfare Checklist

Children Act 1989 S.1 (3)

(a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding): *This should report what the child says or expresses. Also add practitioner's observations and interpretation where appropriate to give clarity.*

(b) The child's physical, emotional and educational needs: *Include any information from school, health visitor, doctor, psychologist and/or any other professional involved with the child.*

(c) The likely effect on the child of any change in the child's circumstances: *Include change in any contact or residence arrangements, separation from birth parents, geographical move, change of school etc.*

(d) The child's age, sex, background and any characteristics of the child which the Court considers relevant: *Professional assessment of the needs of child in relation to these and other relevant criteria as it affects potential arrangements. Address the issues of diversity, e.g. disability, heritage, culture, religion and how related needs are met.*

(e) Any harm which the child has suffered or is at risk of suffering: *Any information from Social Services, NSPCC or*

any other agency, including schools, which relates to harm or risk to the child. Include details of any action taken to reduce risk. Consider the impact of domestic violence/abuse on the child and assess any emotional abuse the child may suffer as a result of parental conflict\behaviour.

(f) How capable each of the child's parents and any other person in relation to whom the Court considers the question to be relevant is of meeting the child's needs: *Assessment of each parent and any other relevant person in the light of each party's views and attitudes. Also address the attitude of the parties to the child's wishes and feelings. The Children & Family Reporter's observations and those of other professionals.*

(g) Range of powers available to the Court under this Act in the proceedings in question: *Advise if an order is necessary for the child's best interests. State what kind of order – consider Contact Order/arrangements and whether the child should be made a party.*

4. Assessment

- *Summary of assessments made on the basis of the Welfare Checklist and how each party can best meet the child's need;*
- *Where relevant reference should be made to the acceptance or otherwise of expert advice, with the reasons for departing from any expert recommendation clearly explained; and*
- *Assessment of whether parties can manage their own arrangements.*
- *Consider the impact of any issues arising from Human Rights legislation.*

5. Recommendation

- *State the options for the court;*
- *State order(s), if any, recommended for the child;*
- *If an order is recommended, state the form the order should take. This should cover current applications for orders and any orders not being applied for which the Children's Guardian considers to be in the child's best interests;*
- *Identify any necessary further work involved, e.g. reviews by the court, further CAFCASS involvement or not;*
- *Where a Family Assistance Order is recommended, refer to the relevant 'exceptional circumstances', agreement of parties, proposed work to be carried out and to the persons to be named in the order; and*

- *Identify if it is in the interests of the child that the Court considers making a direction under section 91 (14) of the Children Act i.e. an order prohibiting any further applications in respect of the child without leave of the court.*

In addition to the Welfare Checklist given above, CAFCASS officers must also comply with their own service standards and policies. CAFCASS have been rolling out a *Domestic Violence Toolkit* across the country, following a pilot, and we shall look at this in **Chapter 10**.

Note: it is a Contempt of Court to disclose a CAFCASS report to anyone without the consent of the Court.

7.4.3. Analysis & recommendations

Rather than use the full Section 7 Template, CAFCASS are making increasing use of a new **Analysis and Recommendations pro forma**, presumably to simplify reports and enable them to be completed more quickly at a time of growing pressure on the service. These new shorter reports are expected to be no longer than 3 pages.

The new pro forma has come under considerable criticism; the headings are frequently not appropriate to the case in question, they do not promote the rigorous analysis that these cases require and deserve, but tend to result in a stream of consciousness report that is both difficult to follow (and hence ill thought through) and superficial in its analysis of the issues.

Of greatest concern is that the new pro forma does not feature the welfare checklist which statute law demands should be at the heart of everything CAFCASS does. To omit the checklist exposes CAFCASS officers to sometimes unnecessary challenge through cross examination, causing greater work and delay, contrary to the intention behind the pro forma.

Clearly, if you receive a report which is inadequate because it has ignored the welfare checklist, you must challenge it on the grounds of illegality.

7.4.4. Calling witnesses

Don't call friends and family members to provide a general paean to your parenting skills – anyone can do this. The judge will get evidence on your parenting skills from CAFCASS, not from your witnesses. Only use a witness to prove or disprove a particular *fact*. You need witnesses who can provide first-hand evidence, not second-hand or 'hearsay'. Seeing a bruise is evidence, but assuming that you caused it is hearsay; actually witnessing you causing it is first-hand evidence. Hearsay evidence is worthless, and will probably be rejected by the Court.

Generally witnesses submit their evidence in written statements or affidavits and are only required to attend Court for the final hearing. Statements must be presented in the appropriate format set out in **Practice Direction 22A**; they must carry a clause saying that the evidence presented is true and they must be signed. See the template for **position statements** above. The witness must be able to attend

Court; a statement provided by a witness who can't or won't attend will carry very little weight.

If you want to challenge the evidence provided by other witnesses they must be called to the Court so that you can cross-examine them. See Family Procedure Rules 2010, **Rule 24**. **If you do not challenge evidence the Court will accept it as true.**

Only the Court can order a witness to be called and you must therefore ask the Court to make a direction accordingly and give the Court a list of witnesses if you wish, for example, that a doctor or psychiatrist should give evidence, or that a CAFCASS officer should be available for cross-examining. The court may issue a Witness Summons (particularly if the witness refuses) on **Form N20** which can be used to 'require a witness to attend court to give evidence, to produce documents to the court, or both'. The form must be filed at least 7 days before the hearing and served on the witness at least 4 days before. You will have to **pay a fee** and the witness's travel expenses and compensation for loss of time. Two copies of the form should be filed with the court. If the witness then fails to attend once they have been **subpoenaed** they will be in contempt and be liable for a fine of up to £1,000.

7.4.5. Expert witnesses

There will be situations in a case in which you or the other side need to call on the services of an expert witness. This may be a medical practitioner, for example where there are abuse allegations, a clinical psychologist, an expert on parental alienation, or an expert on the law in some foreign jurisdiction. An expert witness will assist the Court to:

- identify, narrow and where possible agree the issues between the parties;
- provide an opinion about a question that is not within the skill and experience of the Court;
- encourage the early identification of questions that need to be answered by an expert; and
- encourage disclosure of full and frank information between the parties, the Court and any expert instructed.

The rules on the instruction of experts are given in **Part 25** of the Family Procedure Rules 2010. The Court's permission must be obtained to call an expert, instruct an expert or to introduce their report as evidence. The Court's permission must be obtained if you want the expert to examine your child (**Rule 12.20**).

- Like a solicitor or barrister, an expert's overriding duty is to the Court and not to you, however much you may be paying – their advice must be independent.

- Expert witnesses must be independent of the parties and should generally be jointly instructed. It is preferable – though not always possible in the adversarial Family Courts – that there should be only one expert; having one representing each side is likely to increase time, costs and conflict. The Children's Guardian's solicitor will almost always instruct the expert in cases where a Guardian has been appointed.

- If one party objects to the report produced, it still goes into the bundle as evidence, but the objecting party must ask that the expert be called so that they can be cross-examined. In the rare situation that each side has an expert, both must be called for cross-examination.

- If you wish to call an expert witness and your children's other parent and legal team object – for example where you are arguing for parental alienation – you will first need to make enquiries of the expert (or possibly more than one expert) to provide the Court with the information necessary to persuade it to call the expert, and to issue a subpoena for their attendance; you must have the consent of the Court and cannot use an expert witness otherwise.

- Disclosure of information about your case to others is governed by the Family Procedure Rules 2010. As we shall discuss more fully at **Section 8.8.2**, these rules permit the communication of information to an expert witness only if the Court has authorised their instruction. You must also have the consent of the Court if your child is to be examined or assessed by an expert witness. You must seek consent by or at the First Hearing Dispute Resolution Appointment (FHDRA). In an emergency or urgent case you must make a without-notice application to the Court for directions on what steps you should take. If the Court makes an order requiring a report or assessment from an expert, you must serve them with a copy of the order as soon as you receive it.

- If you are representing yourself and both sides are jointly instructing the expert the Court will designate the other side's solicitor 'the nominated professional'; he or she must then, by 11:00 on the business day before the relevant hearing, file and serve a written proposal to instruct the expert in the following detail:

  1. the name, discipline, qualifications and expertise of the expert (by way of curriculum vitae where possible);

  2. the expert's availability to undertake the work;

  3. the relevance of the expert evidence sought to be adduced to the issues in the proceedings and the specific questions upon which it is proposed that the expert should give an opinion (including the relevance of any ethnic, cultural, religious or linguistic contexts);

  4. the timetable for the report;

  5. the responsibility for instruction;

6. whether or not the expert evidence can properly be obtained by the joint instruction of the expert by two or more of the parties;

7. whether the expert evidence can properly be obtained by only one party (for example, on behalf of the child);

8. why the expert evidence proposed cannot be given by social services undertaking a core assessment or by the Children's Guardian in accordance with their respective statutory duties;

9. the likely cost of the report on an hourly or other charging basis: where possible, the expert's terms of instruction should be made available to the Court;

10. the proposed apportionment (at least in the first instance) of any jointly instructed expert's fee; when it is to be paid; and, if applicable, whether public funding has been approved.

- The nominated professional must also, by 11:00 on the business day before the relevant hearing, submit to the Court a draft order for directions dealing in particular with:

1. the party who is to be responsible for drafting the letter of instruction and providing the documents to the expert;

2. the issues identified by the Court and the questions about which the expert is to give an opinion;

3. the timetable within which the report is to be prepared, filed and served;

4. the disclosure of the report to the parties and to any other expert;

5. the organisation of, preparation for and conduct of an experts' discussion;

6. the preparation of a statement of agreement and disagreement by the experts following an experts' discussion;

7. making available to the Court at an early opportunity the expert reports in electronic form;

8. the attendance of the expert at Court to give oral evidence (alternatively, the expert giving his or her evidence in writing or remotely by video link), whether at or for the Final Hearing or another hearing; unless agreement about the opinions given by the expert is reached at or before the Issues Resolution Hearing ('IRH') or, if no IRH is to be held, by a specified date prior to the hearing at which the expert is to give oral evidence ('the specified date').

- If you cannot agree the terms of the letter of instruction with the other side, which is preferable, you will have to email the Court a written request, copied to the other side, that it settle the letter.

- If the consent of the Court has not been granted, any evidence arising may not be presented to the Court without its permission. If the expert has been called at your ex's instigation, you must obviously cooperate with them fully.

- You must take great care as to the choice of expert witness and you may need to approach more than one. You must then give the Court details of the experts so that it can make a decision on whether they should be called. This will involve giving the experts sufficient anonymised information on the case for them to decide whether or not to accept instructions. This disclosure does not require the consent of the Court and does not constitute contempt.

- Once you have engaged an expert witness you must make it clear to them that they are to present their evidence to the Court and will be bound by **Practice Direction 25A**. You must write them a letter of instruction which must conform to the Practice Direction's guidance. The expert's advice must be independent and pertinent. If an issue is beyond their competence they must say so, and if necessary recommend that another expert witness is required.

- You must provide the expert with details of the proceedings and the precise question they are engaged to answer. You must give details of the consent issued by the Court – for example, for examination of the child. You must provide details of the Court's timetable and dates of hearings.

- The letter of instruction must be filed and served within 5 business days of the relevant hearing by the nominated professional, and must:

1. set out the context in which the expert's opinion is sought (including any ethnic, cultural, religious or linguistic contexts);

2. set out the specific questions which the expert is required to answer, ensuring that they:

   a) are within the ambit of the expert's area of expertise;

   b) do not contain unnecessary or irrelevant detail;

   c) are kept to a manageable number and are clear, focused and direct; and

   d) reflect what the expert has been requested to do by the Court.

3. list the documentation provided, or provide for the expert an indexed and paginated bundle which shall include:

   a) a copy of the order (or those parts of the order) which gives permission for the instruction of the expert, immediately the order becomes available;

   b) an agreed list of essential reading; and

   c) a copy of the **Practice Direction**;

4. identify materials that have not been produced either as original medical (or other professional) records or in response to an instruction from a party, as such materials may contain an assumption as to the standard of proof, the admissibility or otherwise of hearsay evidence, and other important procedural and substantive questions relating to the different purposes of other enquiries (for example, criminal or disciplinary proceedings);

5. identify all requests to third parties for disclosure and their responses, to avoid partial disclosure, which tends only to prove a case rather than give full and frank information;

6. identify the relevant people concerned with the proceedings (for example, the treating clinicians) and inform the expert of his or her right to talk to them provided that an accurate record is made of the discussions;

7. identify any other expert instructed in the proceedings and advise the expert of his or her right to talk to the other experts provided that an accurate record is made of the discussions;

8. subject to any public funding requirement for prior authority, define the contractual basis upon which the expert is retained and in particular the funding mechanism including how much the expert will be paid (an hourly rate and overall estimate should already have been obtained), when the expert will be paid, and what limitation there might be on the amount the expert can charge for the work which he or she will have to do. In cases where the parties are publicly funded, there should also be a brief explanation of the costs and expenses excluded from public funding by **Funding Code criterion 1.3** and the detailed assessment process. The costs and expenses excluded are those 'of or relating to the residential assessment of a child' and those 'of or relating to treatment, therapy, training or other interventions of an educative or rehabilitative nature'.

Ensure that the expert gives you all the information you require of him: whether the report is within his competence, whether he is available at the required times and can produce the report according to the Court's timetable, and what his costs will be.

If the other side instructs the expert, find out who they are intending to use before you go to Court and make sure that you have a copy of the expert's curriculum vitae and a list of dates when they will be available. If you have access to an internet forum enquire whether anyone else has used this expert.

The Court will make the final directions as to who is to be instructed, and which parties they are to interview. The Court will also make directions as to the timetabling of reports and subsequent hearings (which will probably then be ignored).

The expert's report must be delivered on time, and must set out their experience and qualifications. It must summarise the instructions received. It must identify any evidence which the expert has used – such as medical records. It must state if the report is based on any assessment or examination carried out by a third party and identify

them and their expertise. It must distinguish which facts are within the expert's own knowledge.

When expressing an opinion to the Court the expert must consider all relevant facts, including current literature and research (for example on PAS). He must describe the process he has employed, highlighting facts, deductions, and contradictory or unusual features of the case. He must identify between controversial hypotheses and peer-reviewed consensus. If there is a range of opinion on a matter he must highlight this, and give the range of factors which have led him, on balance, to his opinion. If his opinion is provisional or qualified he must state why, and what further information he requires.

If you do not understand something in the report you must provide written questions within 10 business days. The Court will decide the timetable for the expert to reply.

If there is an expert for each side the Court will direct that they meet or communicate to reach agreement or identify where they disagree, and to explain these issues to the Court. This meeting must be arranged and chaired by the nominated professional within 15 business days after the report has been filed. At least 5 days before the meeting the nominated professional must prepare an agenda listing those questions which are necessary to clarify areas of disagreement; it should not contain questions already asked in the letter of instruction. If you wish to add your own questions to the agenda you must do so at least 2 days before the meeting. Jointly instructed experts must not attend meetings at which all parties are not present.

Expert reports are expensive and if experts attend Court their expenses will have to be paid. The expectation is that the costs are split equally if you are jointly instructing. If you are receiving legal aid then that may pay half the cost, on the assumption that the other party will pay half. One alternative is to have your child made a party to proceedings with a guardian funded by legal aid, and their legal aid may then cover the expert's costs.

7.4.6. Psychological evaluation

It is not uncommon for the Court to direct that a party should submit to a psychological assessment. This will be conducted by an expert appointed by the Court and paid for by the party to be assessed; it will typically cost in the region of £3,000 - £5,000. It will be prompted by allegations of psychological instability and may be requested to introduce further delay. The British Psychological Society defines an expert as 'a person who, through special training, study and experience, is able to furnish the court, tribunal or oral hearing with scientific or technical information which is likely to be outside the experience and knowledge of a judge, magistrate, convenor or jury'.

The purpose of a psychological assessment in family proceedings will usually be to advise the Court as to the capacity a parent has in order to provide 'good enough' parenting to their child. There is no power under the Children Act 1989 to compel an adult to submit to a psychological assessment, though there is under other mental health legislation. **Section 11** of the Children Act does provide for

conditions before contact can take place and these can include a psychiatric evaluation,

Many parents will be tempted to agree to submit to an evaluation in order to validate their position and have allegations against them dismissed by a professional – 'if you have nothing to hid, you have nothing to fear.' We would **strongly** advise against this; the assessment may well go against you and indicate that you are not suitable to have contact with your children.

Psychology is not an exact science and when you are not displaying obvious signs of an identifiable disorder they will label you with the catch-all diagnosis of 'adjustment disorder'. This is essentially an over-reaction – in their view – to factors in your life which cause stress. All parents in these situations can be presented as angry, traumatised, etc. Psychologists who toe the current party line that all dads are bad get the work to return to court, those who go against the party line and do what's right do not get the work. A negative report which advises further counselling or other treatment helps support the industry to which the expert belongs.

Frustratingly, behaviour which appears abnormal, psychotic and sociopathic to you is normal for the courts and excused as the result of the stress under which you have placed your children's other parent or, when the other parent is the mother, on post natal depression. Like Parental Alienation Syndrome, conditions such as Divorce Related Malicious Mother Syndrome are not recognised by the definitive DSM-IV and any reference to them is currently likely to be laughed out of court. This is why psychological issues are sometimes best avoided and you are advised to take a purely legal approach.

A common ploy to prevent contact is for a resident parent to claim that the possibility of contact causes extreme stress – in spite of the fact that there is often no contact taking place in such cases; a corresponding claim is that the stress experienced renders the parent unable to care for the child. It is entirely justified in such cases that the resident parent should be the subject of a psychiatric assessment and you are advised to request this of the judge.

Undoubtedly some unscrupulous lawyers encourage this behaviour (and sickeningly exploit mental illness) as the financial reward for them depends on the time spent in litigation and they know that for you to present it as evidence is going to be very difficult.

In Children Act proceedings, the judge should be challenged as to his jurisdiction to make such an order. However, what he or she *can* do is to threaten consequences if you don't voluntarily comply (i.e. that you cannot see your child unless you co-operate). You will then have to challenge the order denying you contact – or whatever it may be – and argue that an assessment is unnecessary, draconian, and that a refusal to undergo it is not a reason on the facts of the case to deny or restrict your contact.

Our position is that psychological assessments, anger management classes and parenting classes are all tools of the Court which will be used to bully and threaten parents even though they may be unlawful. Many parents, mostly fathers, have already been pre-judged to pose a risk to their children by the courts, CAFCASS and the authorities. It is our experience that a father who demonstrates any emotion during a psychological assessment is likely to have this used against him. Unless he is a proven risk to his children (to the criminal

standard of proof) or has been detained under the Mental Health Act, there is no obligation to agree to any of these tests. Furthermore, it is our position that by agreeing, fathers are establishing these tests as the norm and will be condemning future fathers to the same fate. We advocate non-compliance and demand the unconditional right of all parents to see their children. The thuggery of the courts is terrifying and an example that the lunatics truly are running the asylum.

The problem with making any observations on your ex's mental health is that their legal team will deny any allegations strenuously and attempt to present you as malicious and trouble-making. They may well demand a finding of fact hearing in which they will try to dismiss these allegations.

Persuading a court that your children's other parent has some personality disorder can be very challenging – however clear it may be to you. Notwithstanding the fact that a parent who systematically sets about stripping their own child of a loving parent is almost certainly disordered, a court is likely to believe you vengeful and vindictive. You need to be absolutely certain of your ground.

The first thing you need to do therefore is to ensure you have cast-iron evidence. Secondly, do not labour the point too much.

Be concise and accurate: list any relevant incidents, such as suicide attempts or self-harming; any treatment they may have had; and any medication they may be on. Also detail briefly the effects of this on your children. All this must go onto the Form C1A, and in greater detail into your position statement.

Very often the courts simply ignore these issues, but if your children's other parent has a serious medical condition which affects the care of your children the Court must accept it as evidence. Many non-resident parents find it very hard to accept that the courts will not protect their children from a potentially dangerous or neglectful resident parent, but sadly it is an idea we have to get used to.

In Re S (A Child) (Contact: Promoting Relationship with Absent Parent) [2004] 1 FLR 1279 the Court of Appeal directed that a psychiatrist should assess the family and report on the prospects for contact following dismissal of the father's application by the lower court. You can also ask the judge in your application that he order a Section 7 welfare report from CAFCASS. Ask that they look at these issues:

- Consider the resident parent's past medical record and any other medical evidence to determine whether sole custody is in the child's best interests;
- Establish whether there are any grounds for the non-resident parent's concerns regarding the resident parent's medical problems;
- Determine whether there are good reasons to deny the non-resident parent a Shared Residence Order.

Leave of the Court is needed for your own expert to examine your children, but not otherwise to write a report. Arguably you need leave of the Court to show your expert the papers and evidence in the case but you are best advised just to go ahead anyway and invoke Article

6(1) of the European Convention on Human Rights which guarantees your right to a fair trial.

A child psychologist will initially contact

Below is a typical letter from a which shows the type of assessment they will make:

Dear (Solicitor)

re: (Father)-v-(Mother) Children:

Thank you for your letter of instruction and bundle sent to me (Date x). I confirm that I am able to undertake this assessment and can file my report by (Date y, 4 months after date x). In fact, I expect to start work on the case mid to late (Month p) and to file my report by the end of (Month q).

I confirm that I am available to give evidence at the final hearing, if required, (Date z, 6 months after date x).

I note that my instructions require me to give my opinion on the children and also to comment on the parents' perceptions of their roles and their children's needs, and to comment on how far I think the parents are capable of change if necessary.

In order to carry out the assessment of this family I would plan to do the following:

1. *One, or possibly two visits to the children's school to gather information from the teachers on each child's general presentation. I use school as a venue for assessing children in private law cases as I find that this is a 'neutral' venue but none the less is a place which is familiar to the children and a place in which they feel confident and secure.*

2. *A visit to observe the children within their current home environment.*

3. *Following my individual assessment of the children, I shall decide whether my assessment requires me to observe the children in direct contact with their father. Should I find that this is appropriate, I shall contact you.*

4. *Individual interviews with each parent at my offices at (Name) Chambers. These interviews will include a standardised measure to assess each parent's view of themselves and of their children.*

5. *Should I consider at any stage of my assessment that further assessment by another professional is necessary in order to assist the court, I shall let you know immediately.*

In order to assess both children and both parents I estimate my fee to be in the region of £3,000 + VAT.

I should be grateful if you could supply me with the address and telephone number of both (Father) and (Mother). I would

intend telephoning them in order to arrange mutually convenient times for my appointments with them. With regard to (Mother), I would ask that she provide me with contact information for the children's school and that she approach the school before hand to let them know that I would be making contact.

My intention would be to speak to each parent by telephone prior to seeing the children so that I can answer any queries that they may have about the kind of work I would be undertaking with each child.

Please let me know if you require any further information about my proposed assessment.

Yours sincerely

7.5. Cases

Hair strand tests

London Borough of Richmond v Others [2010] EWHC 2903 (Fam)

DNA tests

S v S; W v Official Solicitor [1970] 3 ALL ER 107
Mikulic v Croatia [2002] FCR 720

Re A (A Child: Joint Residence/Parental Responsibility) [2008] EWCA Civ 867

Expert witnesses

Re G (Minors) (Expert Witnesses) [1994] FLR 291
Re C (Expert evidence: Disclosure: Practice) [1995] 1 FLR 204
Re CS (Expert Witnesses) [1996] 2 FLR 115
Re CB and JB (Care Proceedings: Guidelines) [1998] FLR 211
Re X (Non-Accidental Injury: Expert Evidence) [2001] 2 FLR 90
Re R (Care: Disclosure: Nature of Proceedings) [2002] 2 FLR 211
Re L (Care: Assessment: Fair Trial) [2002] 2 FLR 730
A v A [2004] EWHC 142 (Fam)
Re S (A Child) (Contact: Promoting Relationship with Absent Parent) [2004] 1 FLR 1279
Re W (A Child) [2008] EWCA Civ 1181

CHAPTER 8: THE COURT

> *"Why **do** they do these things to children, Pan? Do they all hate children so much, that they want to tear them apart like this? Why do they **do** it?"*

Novelist Philip Pullman[274]

8.1. Different Levels of Court

Family proceedings can take place in a variety of courts. The Children Act 1989 created the concept of 'The court' in order to tie together these different levels of court. The courts listed below are those in which you may attend family proceedings, starting with the lowest level.

To find your nearest appropriate court use the **Court Finder** service provided by Her Majesty's Court Service.

- **Magistrates Courts**. These are presided over either by a 'bench' of two or three lay magistrates known as Justices of the Peace (JPs) or one legally qualified 'District Judge' (formerly known as a 'stipendiary magistrate'). Magistrates have no formal legal training and will not generally be familiar with the law; they will however have a clerk sitting with them who will be legally qualified. This can delay proceedings and mean that decisions are less creative than those made by a judge. Some Magistrates' Courts are part of the Family Proceedings Court and a family panel will sit to hear family law cases including care and adoption cases. Magistrates' Courts do not hear divorce proceedings and tend to hear the

[274] Philip Pullman, *Northern Lights*, Chapter 23, 1995

easier cases. You can start your application here if it is fairly straightforward or in the County Court if it is more complex.

You may also find yourself in a Magistrates' Court if you are taken to court by the CSA/CMEC, or if you breach Non-Molestation Orders, etc.

- **County Courts** (see **Resource 1** for a list). These are statutory courts with a civil – not criminal – jurisdiction and are presided over by a single District Judge or a Circuit Judge who is more senior and can hear appeals from the District Judge. Judges here tend to be more experienced in family matters, though none of them deals only with family cases. The Principal Registry in London is a County Court. County Courts deal with most appeals from the Magistrates' Courts.

- **The High Court**. Complicated, difficult or intractable family cases will be transferred up to the High Court, although some cases can start here, and its judges have greater powers than those in the County and Magistrates' Courts. Often proceedings will be at the Royal Courts of Justice (RCJ) in London, but there are other High Courts around the country. Cases can also be transferred down from the High Court to the County Court.

- **The Court of Appeal**. Some appeals from the Magistrates Courts and Family Proceedings Court will be to the High Court. Appeals against Orders made by a Circuit Judge or in the High Court are made to the Court of Appeal. The Civil Division of this court deals with appeals from these lower courts, and its judgements are binding on them. Cases are heard by a group of (usually three) judges.

- **The Supreme Court**. This replaces the House of Lords as the UK's highest appellate court for most cases in England and Wales, and its decisions are binding on all other courts and will typically be heard by 5 judges.

- **The European Court of Human Rights** (ECHR). Decisions made by any court in England and Wales which are alleged to breach the European Convention on Human Rights can be appealed in the ECHR. Cases are usually heard by seven judges. If your rights are deemed to have been breached you are most likely to receive financial compensation. Decisions do not affect English legislation and it remains for the Government to decide on what action to take, if any.

Note: that the Coalition Government is currently proposing to close 93 Magistrates' Courts and 49 County Courts in order to cut costs; this will impact on the ease of getting hearings when you need them and will inevitably increase delays.

Which court proceedings commence in and matters of transfer between courts are regulated by the Children (Allocation of Proceedings) Order 1991. Transfer of cases between district judges, circuit judges and High Court judges is regulated by the Allocation and Transfer of Proceedings Order 2008 which supersedes the Family Proceedings (Allocation to Judiciary Amendment) Directions 2002. The circumstances in which divorce cases may be transferred are given by **Rule 7.24** of the Family Procedure Rules 2010. The allocation

of courts and matters of transfer are governed by the 'no delay' principle.

Transfer of proceedings may take place in order to link proceedings which are currently in two different courts, but generally will be on the basis of a particularly grave or complex case which needs to be transferred to a higher court. Relevant criteria are:

- whether there is complicated or conflicting evidence about risk to the child's physical or moral well-being or welfare;
- the number of parties;
- conflict with the law of another jurisdiction;
- some novel or difficult point of law;
- some question of general public interest.

If the Family Proceedings Court refuses to transfer your case, you must apply to a County Court for an order transferring the proceedings to itself. The County Court will consider the checklist in Article 7 of the Children (Allocation of Proceedings) Order 1991 and may alternatively transfer the proceedings to the High Court under Article 12. See Article 10 for transfer between County Courts.

Under Article 11(2) Children (Allocation of Proceedings) Order, the County Court has the power to transfer private law proceedings back to the Magistrate's Court. If you wish to appeal against this decision the appeal is made to a judge of the Family Division or, where the order was made by a district judge or a deputy district judge or the Principal Registry, to a circuit judge.

8.2. Court Rules

The manner in which the courts must deal with cases is determined by the **Family Procedure Rules 2010** (FPR) and their associated Practice Directions. Some proceedings such as committals come under the **Civil Procedure Rules 2010**.

The first rule of the FPR is that family proceedings must now be dealt with according to the 'Overriding Objective' which is that the Court deals with a case 'justly, having regard to any welfare issues involved'. This rather desperate measure is driven by the need to spread dwindling resources ever more thinly over a rising case load. The parties are required to help the Court accomplish this and promote the welfare principle; this means that observing the welfare principle which was the responsibility of the Court under the Children Act is now deemed also to be the responsibility of the parents. Remember that judges consider parents who end up in court to have failed their children. In order to achieve the 'Overriding Objective' the Court as far as is practicable will,

1. Deal expeditiously and fairly with every case;

2. Deal with a case in ways which are proportionate to the nature, importance and complexity of the issues;

3. Ensure that the parties are on an equal footing;

4. Save unnecessary expense;

5. Allot to each case an appropriate share of the Court's resources, while taking account of the need to allot resources to other cases.

8.3. Court Fees

The fees the Court will charge you for applications, etc., are constantly increasing, and this list is not comprehensive, so it is wise to check the **current fees** before you place the application with the court. There may be other fees which you will be charged, particularly in the High Court or Court of Appeal, so be aware.

Payment can be made by credit or debit card, cash, postal order or cheque. If a cheque bounces the Court will take steps to recover the payment and your case will be delayed or even struck out.

If you are unable to pay the fee you can apply for fee remission to reduce the fees or for fee exemption which means you don't have to pay anything. If you think you qualify you must complete Form EX160, which is attached to the guidance leaflet **EX160A**. Note that Magistrates' Court fees are given in the Magistrates' Court Fees (Amendment Order) 2007.[275]

Divorce	
Filing a petition for divorce, dissolution, annulment or judicial separation	£340
Filing a second or subsequent petition with leave	£90
Filing an answer to a divorce petition or cross-petition	£230
Filing an amended petition	£90
Filing originating proceedings where no other fee is specified	£230
Application to make a decree nisi, absolute (divorce), or a conditional order, final (dissolution)	£45
Financial Remedy	
Application on notice for financial remedy, other than by consent	£240
Filing a notice of intention to proceed with an application for financial remedy	£240
Application by consent for a financial order	£45
Applications for injunctive orders	
Application for a Non-Molestation Order	£70
Application for an Occupation Order	£70

[275] http://www.legislation.gov.uk/si/si2007/uksi_20072619_en_1

An applicant can apply for any combination of these orders. Where an application is made for more than one of these orders at the same time, only one fee is payable.	
Applications under the Children Act 1989	
Section 8 Orders: residence, contact, prohibited steps and specific issue	£200
Enforcement Order in respect of a Section 8 Contact Order	£200
Parental responsibility	£200
Financial provision for children	£200
Leave to change a child's name	£200
Leave to remove a child from the jurisdiction	£200
Special Guardianship	£160
Contact with a child in care	£170
Adoption and wardship	
On an application for permission, or an order, made under any provision in Part 1 of the Adoption and Children Act 2002, except s.22	£160
Parentage	
Filing a petition for declaration of parentage or non-parentage	£340

When applying for permission, no fee is payable on filing the subsequent application. Where an application is made or permission is sought under two or more provisions of the Children Act 1989, or the Adoption and Children Act 2002, or the Children and Adoption Act 2006, only one fee is payable, and if the fees are different, the highest fee is paid.	
Maintenance orders	
Application for a Maintenance Order to be registered	£40
Application for a Maintenance Order to be sent abroad for enforcement	£40
Applications within proceedings	
Application on notice where no other fee is specified	£90
Application by consent or without notice where no other fee is specified	£45
Application for breach of an Enforcement Order	£90
Application for revocation of an Enforcement Order	£90
Appeals to the High Court and County Court	
Filing a notice of appeal of any decision in family proceedings made by a district judge in the High Court or County Court	£115
Filing a notice of appeal of any provision of the Children Act 1989, from a Magistrates' Court (except care and	

supervision orders):	
The appeal fee is the same as the issue fee payable under each separate provision of the Children Act.	
Filing a notice of appeal against a care or supervision order from a Magistrates' Court	£170
Filing a notice of appeal against a contribution order	£170
Appeals to the Court of Appeal	
Application for permission to appeal	£200
Application for appeal	£400
Affidavits	£40
Copy documents	
If you ask the Court to make copies of documents, receive or send a fax on your behalf, or provide a copy of a document already provided:	
For between 1 and 10 pages of any document	£5
For each subsequent page of the same document – per sheet	50p
For copies of documents provided on computer disk or other electronic form	£5

Bailiffs	
To have any document process served by a bailiff	£105

8.4. Judges

8.4.1. Don't be intimidated

> *The judges are like pit bosses in Vegas casinos. It's their job to make sure everybody stays at the table.*
>
> American actor Alec Baldwin[276]

It is easy to be intimidated by the ritual of the Court and by the judge, who will commonly seem distant and arrogant, and who holds your future in his hands.

The reality is that many Family Court judges, especially in the lower courts, are not terribly smart; it is said in the legal profession that the feebler judges end up in the Family Court, and even the *Family Bench Book* famously describes most family cases as 'not intellectually

[276] *Alec Baldwin: Not my intention to 'bury' ex-wife Kim Basinger in new book*, New York Daily News, 31 May 2008, http://www.nydailynews.com/gossip/2008/05/31/2008-05-31_alec_baldwin_not_my_intention_to_bury_ex.html

particularly demanding',[277] certainly when compared with other areas of law. It is just as well. Judges are not paid as well as solicitors and are not as familiar with the law; you will find that your barrister, if you have one, or your ex's barrister will be expected to remind the judge of points of law, and this can be embarrassing for everyone.

You are advised to find out which judge will be hearing your case and then to research cases similar to yours on which they have made judgements. You do this using a database called LexisNexis which is available from the reference libraries listed in **Resource 4**.

Judges have a wide range of powers available to them and a wide range of options they can take in the course of a case in order to manage it effectively. Their powers are provided under legislation such as the Magistrates Courts Act 1980 and the Superior Courts Act 1981; available options are provided under the Family Procedure Rules 2010, a piece of legislation known as a Statutory Instrument which is susceptible to constant revision – sometimes several times a year. These powers can be exercised on application by a litigant or on the Court's own initiative. Judges may only do what the law allows them to do.

High Court judges, however, have an additional power – called 'Inherent Jurisdiction' – which enables them to make orders beyond what is prescribed by Parliament. This is rarely invoked but you should be aware of it.

Judges are notorious for not reading more than the position statement and for not being familiar with the contents of the bundle. This may be because the other side has deliberately admitted evidence or statements late. If this is the case you must challenge the judge to explain why he has not read the bundle and insist that he does so. This is your hearing and it is costing you a small fortune: stand up for your rights.

To banish your nerves the night before you go to court, try the actor's trick of imagining your audience naked; alternatively use this excellent piece of advice from Natasha Phillips, the author of the *Divorce Manual*:[278]

> *Try putting on your bath robe and shower cap (to mimic the judge's gown and wig) and take your hairbrush or comb as a proxy gavel and say the various legal terms aloud (with an overly serious voice and if you have spectacles, this exercise works best if they are placed at the farthest tip of your nose). Say some phrases out loud like "Has the Respondent submitted a bundle?" or "court is adjourned!" (for this one you will need to bang your proxy gavel against your wall three times and look slightly uncomfortable).*

Family Court judges may like to imagine that they base their decisions on immutable principles, but perhaps they should consider Lord Justice Thorpe's admission:

[277] *The Family Bench Book*, Judicial Studies Board, 2006, http://www.jsboard.co.uk/downloads/fambb/4_control_of_the_court.pdf

[278] http://divorcemanual.blogspot.com/

> *Very few family law decisions that are 'principled' decisions have a shelf-life of more than one generation. Most principles in family law are actually founded upon social policies or social assumptions made by the judges. Those assumptions as to child development or child help have to be reviewed from time to time.*[279]

The truth is that decisions are often based on fashionable social theories, or, more likely, on whatever was the fashionable social theory a couple of decades ago. Theories about raising children, why children are so damaged by divorce, and how to arrange parenting following separation come and go. Each should be rigorously examined and challenged.

8.4.2. Striking out

When you make your application the Court may decide on its own initiative or on application to reject it. This is called Striking Out a Statement of Case and is enabled under **Rule 4.4** of the Family Procedure Rules 2010.

Applications which may fail under this rule include:

- Applications which set out no facts indicating what the application is about;
- Applications which are incoherent and make no sense;
- Applications which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable application against the respondent.
- Applications which cannot be justified because they are frivolous, scurrilous or obviously ill-founded.

A party can apply for an order under this rule if any of the above apply and they can show that their opponent's case has no chance of success or is 'without merit'.

The Court can make alternative orders, either that the Court retain the application form until the stay is lifted or that the stay will be lifted upon submission by the applicant of further documents. Once an order to strike out has been made under Rule 4.4 the proceedings will come to an end.

The Court can make similar rulings concerning the respondent's answer if it is deemed to fail and may order clarification or additional information.

If an application is rejected because it is without merit the Court must consider whether to make a limited, extended or general civil restraint order. This is in addition to the Court's powers under **Section 91(14)** of the Children Act. The respondent may also apply for such an order.

[279] Quoted by David Bedingfield in *Advocacy in Family Proceedings, a Practical Guide*, Family Law, March 2005

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- A limited civil restraint order prevents the party making further applications in the proceedings without leave of the judge identified in the order; he can apply for leave to appeal.

- An extended civil restraint order prevents the party making any application 'in any matter involving or relating to or touching upon or leading to the proceedings in which the order is made' without leave of the judge identified in the order. The order cannot be made for a period exceeding 2 years.

- A general civil restraint order the party making any application in any court without leave of the judge identified in the order. The order cannot be made for a period exceeding 2 years.

8.4.3. Judicial discretion

Judges are bound by rules, and these are set out in the **Family Procedure Rules 2010**. Should you be in any doubt about whether the Court is behaving appropriately or treating you fairly, refer to these rules.

A judge has almost infinite discretion to make whatever judgement in a case he sees fit. He does not have to rely on an application by one of the parties before making an order, and can make an order on his own initiative (**Rule 4.3**). If he does so, he is not obliged to allow the parties to be heard or make representations (Rule 4.3(4)), but he must advise you that you can apply to have the order 'set aside', 'varied' or 'stayed' (see **Glossary**).

In addition to the legislation concerned and the case precedents, the judgement will be influenced by the judge's own prejudices and agenda. We have discussed this issue already; consider the following case concerning the roles of men and women:

In the case of **Re S (Children) [2002] EWCA Civ 583** the mother had a high-powered job and large salary; the father stayed at home as primary carer. If residence were awarded to the father he would stay in London and the *status quo* would continue; if it were awarded to the mother she would move with the children to Scotland. Had the roles been reversed and the mother been primary carer it would invariably have been the case that she would be awarded residence. The father claimed therefore that not to award him residence in this case would amount to sexual discrimination. Lord Justice Thorpe rejected his argument:

> *That submission seems to me to ignore the realities, namely the very different role and functions of men and women, and the reality that those who sacrifice the opportunity to provide full-time care for their children in favour of a highly competitive professional race do, not uncommonly, question the purpose of all that striving, and question whether they should not re-evaluate their life before the children have grown too old to benefit.*

In other words, in Thorpe's view, the mother was wrong to pursue a career, and should have remained at home according to her proper 'role and function' and look after her children, notwithstanding the fact that the father was doing a perfectly good job. The ruling had the effect of removing the father from his children's lives. Note also

that for Thorpe a mother who pursues a career has 'sacrificed the opportunity' to be a full-time carer, while a mother who takes that opportunity has sacrificed her career. The father sacrificed nothing, and was just being selfish.

Thorpe here is trying to engineer society according to his own beliefs; he has no mandate from Parliament or from the public to do that. How people decide to arrange their private lives should be a matter for them and is protected by Article 8 of the European Convention on Human Rights.

8.4.4. The slip rule

The rule which allows clerical mistakes and accidental omissions in judgements and orders to be corrected by the judge is known as the 'slip rule'. For proceedings governed by the Family Procedure Rules the slip rule is County Court Rules (CCR) Order 15 Rule 5 or Rules of the Supreme Court (RSC) Order 20 Rule 11 and is enabled by Rule 29.16(1). You may also apply without notice for a correction to be made to a judgement or order. In civil proceedings the rule is Civil Proceedings Rules 1998 (CPR) Rule 40.12.

A judge is supposed not to alter the substance of the judgement after he has delivered it in Court, for example by adding new reasons for his decision. He can correct manifest accidental slips and clerical errors and can add clarification. He can remove 'linguistic infelicities' provided that doing so does not alter the substance.

The rest follows from the principle that once the judge is *functus officio* (i.e. he has fulfilled his office) then he cannot have another go at trying the case, his job is done and that is final. Note that the judge is not *functus officio* until the order of the Court is drawn up and sealed (i.e. has the Court's seal upon it) – so it can happen (rarely) that he completely changes his mind before the order is sealed, though he should give the parties opportunity to make further submissions if that is the case.

Unfortunately the Court of Appeal has started encouraging judges in some situations to add to their reasons if there is an appeal. We consider that unlawful and that the danger is too great that judges will simply make up new reasons to justify themselves and thereby hinder appeal. The judgement itself is the most important part of the transcript if you wish to appeal, but it is often a work of literature, showing considerable working up by the judge since the hearing, including explication and case law. This is where the judge explains the reasons behind the order, none of which is necessarily contained in the order itself. The judgement is the legal argument behind the order, and since appeals must be based on the argument that the judge misinterpreted the law (or ignored key arguments) the judgement – together with extracts from the proceedings – is essential.

Doctoring of transcripts by judges is commonplace; they seek the transcripts on the pretext of checking that their judgements – but not any other part of proceedings (such as evidence) – do not contain grammatical or spelling errors, which they are allowed to do under the slip rule. They then use their authority to pervert, corrupt, delete

and alter information. Obviously correcting grammar can change the semantics of the whole sentence.

The transcript then passes from the judge to the applicant. Sometimes litigants have asserted that the transcript bears no resemblance to what actually went on in Court; sometimes passages are transcribed as 'inaudible' when they have been clearly audible on the tape. Sometimes litigants have received blank tapes.

It is better not to ask for the judgement initially; to do so allows the judge to see a copy of the transcript and to correct any mistakes, i.e. the judge claims the tape was inaudible and that is not what he said. Without a copy of the judgement the judge does not get to have a copy pass through his hands. This is the best solution: you already have the judgement on his order so don't waste your money on this.

Obtain the unedited transcript from the official transcriber, and then send another cheque for the judgement afterwards. This way you will get an unedited transcript and one that has been edited by the judge. In any case, full transcripts are prohibitively expensive. It is much better to take detailed notes during proceedings (or to get your McKenzie to do it) and to flag up sections of the discussion/cross-examination for later transcript.

Get on friendly terms with your transcriber – they should be happy to skip through the tapes to find the key passages if you can give them an approximate idea of how far in they are. Note the start and end times of each session in the proceedings, and during the hearing periodically note the time in the margin of your notes: that will give you a rough indication of where on the tapes things are. Roughly 30 minutes of transcription can cost you up to £100.

If you are certain that a judge has seriously tampered with what he actually said in Court, then you should make a complaint directly to the President of the Family Division (currently Lord Justice Wall) as well as to the Judicial Correspondence Unit (at 5th Floor, 30 Millbank, London, SW1P 4XB, Telephone 020 7217 4840) and invite them to compare the tapes with the transcript.

8.4.5. Changing your judge

Cases arise in which it may become necessary to have the judge removed from the case, or 'recused'. You can ask the judge to **recuse** himself, or, if he refuses, make an application to the Court of Appeal for him to be recused. The test is given in **F v (1) M (2) D (3) N [2007] EWHC 2543 (Fam);** the judge must:

- Be a fair-minded and informed observer;
- Adopt a balanced approach.

In the case of **Re O [2005] EWCA Civ 573** the applicant Sean O'Connell applied that Judge Timothy Milligan should be recused following the imposition of a s.91 order of indefinite duration. Judges Thorpe and Wall allowed the appeal; Thorpe commented,

> *It is abundantly plain to me that Judge Milligan must part from this case permanently. We have had the opportunity of*

reading what I think may not unfairly be described as gratuitous observations by Judge Milligan to the applicant on 1 November, and I can well understand how a litigant would feel that justice would not be forthcoming for him before that judge in the light of those observations.

To complain about a judge you must have valid grounds to complain about the judge's conduct; you cannot simply complain because you don't like the decision he or she came to in your case. If you believe you have a strong case for complaint you must complain within 12 months to the **Office for Judicial Complaints** (OJC) either by letter or email. You must state clearly:

- your name, address, and telephone number;
- the name of the judge, the Court, the number of your case and the date of the hearing;
- specific details about the grounds of your complaint.

Send your letter to the Office for Judicial Complaints at: 4th Floor Clive House, 70 Petty France, London SW1H 9HD.

Email them at: customer@ojc.gsi.gov.uk

Your complaint can only be dealt with once your case has concluded, which is obviously a problem for many Family Court cases which drag on for years with no sign of conclusion. The OJC will acknowledge your complaint within 2 working days. If the complaint doesn't meet the criteria in the Judicial Discipline Regulations it will be dismissed. If it is not dismissed it must be considered by the Lord Chancellor (currently Kenneth Clarke) and by the Lord Chief Justice (currently Lord Judge). The process can take many months and you should be kept informed at every step. It is very rare for any disciplinary action to be taken against a judge.

The Judicial Discipline (Prescribed Procedures) Regulations 2006 are **available here**, and the 2008 amendments to them are **available here**.

If you wish to make a complaint about a magistrate you should do so by setting out the same information as above and sending it to the local Advisory Committee; contact the OJC for details.

8.5. CAFCASS

The Children and Family Court Advisory and Support Service (CAFCASS) was established in 2001 under the **Criminal Justice and Court Services Act 2000** with a brief to act as 'the eyes and the ears of the court' in both private law cases, advising courts on disputes between parents, and public law cases, advising on applications by local authorities. Its duty under the Act is to:

- safeguard and promote the welfare of children;
- give advice to any court about any application made to it in such proceedings;

- make provision for the children to be represented in such proceedings; and

- provide information, advice and other support for the children and their families.

In practice CAFCASS has now confined itself in private law cases largely to the task of preparing Section 7 welfare reports ordered by the Court during proceedings and advising the Court on what it considers to be in the child's 'best interests'.

The majority of CAFCASS staff are social workers while the remainder are former probation officers; more than 80% of them are women. They provide various services to the courts, reflecting the diverse origins of CAFCASS; collectively they are known as Family Court Advisors (FCAs) and we will use that term here:

- **Children's Guardian** – independent social worker employed by CAFCASS to represent child's interests in court.

- **Guardian ad Litem** – term replaced by Children's Guardian in 2001.

- **Children and Family Reporter** (CFR) – reports on child's welfare (in a Section 7 report) and (supposedly) monitors outcomes.

- **Parental Order Reporter** – CAFCASS officer who reports to the Court under the Human Fertilisation and Embryology Act 1990.

- **Reporting Officer** – CAFCASS officer who reports to the Court under the Adoption and Children Act 2002.

One body replaced by CAFCASS was the Lord Chancellor's Department, and its function is now performed by CAFCASS Legal which acts as the child's solicitor in cases of legal or moral complexity which have not been resolved by the usual measures.

As part of its role to 'provide information, advice and other support for the children and their families', CAFCASS has also taken on the responsibility of 'children's champion', providing advice and support to other government departments with responsibility for the welfare of children.

CAFCASS repeatedly claim on their website and elsewhere that they are independent, but they are not – this is a lie. In October 2010 they signed an agreement to work cooperatively with the judiciary which will be monitored by the Ministry of Justice, the Department of Education and Her Majesty's Court Service. The CAFCASS Board and Corporate Management Team are populated by local authority staff, social workers, lawyers, court staff, adoption agencies and government advisors; there are no ordinary, independent parents involved in the organisation, or representatives from parenting organisations, despite past promises.

8.5.1. What you need to know

According to a November 2010 report by the Public Accounts Committee, chaired by the infamous Margaret Hodge, CAFCASS is 'NOT FIT FOR PURPOSE'.[280] The Committee also lacked any confidence that the Service would improve. Questioning the Chief Executive of CAFCASS, Anthony Douglas, as part of the evidence gathering prior to the report, Hodge said,

> *If you look at staff sickness and staff morale issues, they are dreadful. If you look at the inaccuracy of data, it is shocking… If you look at the Ofsted inspections, eight out of 10 failed… If you look at overspending…we have had to bail them out. All that reads to me as it is one of the most shocking reports that I have read-of an organisation that is not fit for purpose; and you are responsible for it.*

In March 2011 Martha Cover, chair of the Interdisciplinary Alliance for Children – a group of 18 organisations, including NAGALRO and the Association of Lawyers for Children, told the Justice Select Committee that CAFCASS had become so top-heavy 46% of its staff were managers; she concluded,[281]

> *We have considered the possibility of reform rather than abolition, but we have come to the conclusion that* [CAFCASS' inability] *to change to meet the concerns of the other partners in the family justice system is such that we simply have to start again.*

No part of the family justice system has earned the total breakdown of professional and public confidence more than CAFCASS. A detailed analysis of what has gone wrong with the service is beyond the scope of this work, and we would advise you to read our report on CAFCASS in Family Justice on Trial.

8.5.2. CAFCASS and delay

Perhaps the most obvious failure of the Service has been to manage its workload effectively, and this means that if it becomes involved in your case there will be substantial delay both in allocating an officer and then in producing a report. If your case depends on that report, you realistically must be prepared for up to a year to elapse between enlisting the help of the system and receiving the report.

Such a delay is clearly enormously damaging, and completely unacceptable, and it is one of the reasons Fathers 4 Justice exists and campaigns for the reform of the system and the abolition of Cafcass.

So serious had this situation become, and so unable had CAFCASS proved themselves to resolve it, that in July 2009 Sir Mark Potter, the former President of the Family Division, was forced to issue humiliating interim guidance (not a full practice direction) to oblige

[280] Public Accounts Committee, Cafcass's response to increased demand for its services, 03 November 2010, http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpubacc/439/43902.htm

[281] Camilla Pemberton, *MPs told that Cafcass is 'beyond reform' and must be abolished,* Community Care, 25 March 2011, http://www.communitycare.co.uk/Articles/2011/03/25/116540/mps-told-cafcass-is-beyond-reform-and-must-be-abolished.htm

CAFCASS to allocate their resources more effectively.[282] Intended to be a short-term measure, it was to remain in place until September 2011. Although the interim guidance is now lifted, delay continues to be a major problem and the improved working practices CAFCASS is supposed to have adopted do not seem to have reached all areas. One barrister describes an experience which is probably typical,[283]

> *Chronic overwork, organisational bureaucracy, a rather dictatorial management style, a shift towards a rather defensive style of practice and away from a willingness to engage with risk issues, and continuing poor morale.*

This is the guidance Potter provided which CAFCASS should be observing still:

- In new cases CAFCASS must 'have regard' to the timetable drawn up for each child which will be determined by the Court answering the notional question, 'By when should the question relating to this child be answered?' The answer to that question and the timetable must be recorded on the order, together with any changes to the timetable which become necessary.

- Reports on new cases must be completed promptly; these are the time limits:
  - Wishes and feelings: 6 weeks
  - Single issue: 6 weeks
  - More than one issue: 6 to 12 weeks, depending on complexity
  - Risk assessments: 6 to 8 weeks

(In practice average delay seems to be about 16 weeks.)

- In existing cases which have not yet been allocated by CAFCASS or where CAFCASS has not complied with the Court's case management directions, the Court and CAFCASS must draw up a local arrangement to prioritise cases based on the timetable and the child's needs.

- The timetabling for Section 7 reports must be formulated locally, and where estimates are greater than the national limits given above a plan must be drawn up on how the backlog will be eliminated and these targets reached.

- CAFCASS must publish and maintain an information sheet giving details of the services available to parents which the Court may direct, such as contact activities.

- A CAFCASS FCA must be present for all first hearings, including FHDRAs, unless excused by the Court.

- Even when a CAFCASS officer is not in Court, there must be mechanisms whereby CAFCASS can advise a court on the need for

[282] *Agreement between the President of the Family Division, Ministry of Justice, HMCS, Department for Children, Schools and Families and Cafcass*, 30 July 2009, http://www.familylaw.co.uk/images/Teasers/Interim%20Guidance%20for%20England%20-%2030%20July%202009.pdf

[283] Lucy Reed, author of the Pink Tape blog

s.7 reports, and so that CAFCASS can be informed promptly when such a report is ordered.

- Courts must end the practice of ordering s.7 reports in general terms and be specific about what questions they want the FCA to answer. This will be recorded on the order, together with the timeframe and details of safeguarding checks and risk assessments.

- CAFCASS may only file reports late on application to the Court in exceptional circumstances. FCAs must stop writing letters to judges notifying them that they are unable to meet deadlines.

8.5.3. Shared parenting

The feminist-dominated CAFCASS has traditionally opposed shared parenting for many of the reasons given above in **Chapter 1**. In June 2009, however, CAFCASS published a new document, *Guidance for CAFCASS Case Officers on Shared Parenting*.[284] This document was the result of a collaboration between Craig Pickering of *Families Need Fathers* (FNF) and Bruce Clark, Director of Policy with CAFCASS. A month later CAFCASS withdrew the guidance over 'concerns about the research base used'.[285]

Sadly FNF had failed to back up the guidance with sufficient research (though it's fair to say that no amount of research will satisfy some people) and failed to consult more widely, seeking instead to slip it in by the back door. It does show, however, the potential for cooperation between fathers' groups and CAFCASS, first promised in 2005, and may have laid the groundwork for a more permanent solution at some later date.

Clark's name will be familiar to many seasoned campaigners: he was seconded to CAFCASS from its parent ministry the DCSF – formerly the DfES – where he had been jointly responsible for scuppering the *Early Interventions Project*; we relate this shameful story in *Family Justice on Trial.*

While by no means perfect the FNF guidance represented an, albeit brief, U-turn on the position formerly held by CAFCASS. Here are some of the points it made:

- CAFCASS should help both parents to remain involved in their children's lives unless there is a good, evidence based, reason not to.

- Children should spend 'significant' amounts of time with each parent. This does not mean a rigid formula of equal time, though the guidance recommends that equality should always be the starting point unless there are very good reasons why it should not be. Where a Residence Order is to be made, CAFCASS should advise the Court to make it in favour of both parents unless there is a good reason not to.

- When monitoring contact as part of a court-ordered requirement, CAFCASS must inform the Court if the order is breached.

[284] http://www.cafcass.gov.uk/idoc.ashx?docid=68a34368-488b-4b2a-aba9-916fc2944daa&version=-1

[285] CAFCASS email to author, 22 July 2009

- Key decisions about children should be taken by *both* parents.

- CAFCASS must ditch the view held hitherto that 'only one parent "cares" while the other parent is simply a source of finance for the caring or at best is an "uncle" to the child'. This sort of language is unprecedented from CAFCASS.

- Expressions such as 'parent with care' and 'resident parent' are discriminatory and should be avoided; they create the impression that CAFCASS seeks to protect the child's relationship with only one parent. CAFCASS must be careful not to present the impression that it favours one parent over the other; it must approach all cases with an open mind about what arrangement is best for a particular family.

- Advice given to the courts on orders must be shared with both parties, together with the guidance and policies on which that advice is based; parents should not be made to feel that CAFCASS has a hidden agenda.

- Shared parenting describes a wider range of provisions than a Shared Residence Order, which is only one aspect of shared parenting; these provisions include allowing a parent to make all decisions covered by Parental Responsibility.

- Shared parenting arrangements must be child-focussed and flexible.

- The situations in which CAFCASS should not promote shared parenting, according to the guidance, are where there is proven domestic violence or child abuse. Past incidents of violence, however, should not automatically rule out consideration of shared parenting.

- The guidance recognises that some allegations of violence or abuse are false and are made because they are an easy way of obstructing contact. CAFCASS officers should be aware of this and should enable the Court to establish the truth of allegations before jumping to conclusions. Once again, this represents entirely new thinking for CAFCASS.

8.5.4. Interviews

CAFCASS do not always bother to interview both parents, though clearly they should; inevitably it is most frequently fathers who are left out. Increasingly, due to the on-going crisis within CAFCASS, they are not visiting either parent or the child, and base their assessments on telephone interviews and documentary evidence. There are also other important witnesses (grandparents, for example) who should be interviewed but who are not.

If they do come to interview you ensure that you have written down in front of you everything you wish to say to them. It is very easy to forget what you want to say when you are under pressure. Stay very calm and collected and do not raise your voice. Be polite and friendly. Offer coffee or tea and perhaps some biscuits (my FCA ate an entire packet of chocolate hobnobs).

Cooperate with CAFCASS fully. You must always put everything in a child-centred way; always emphasise the child's welfare and needs, and avoid anything which may sound selfish, or which can be interpreted as trying to disparage your ex.

Show CAFCASS the family photos and video you have of yourself with your children.

CAFCASS start from the point of view that if do not have contact it is because you walked away; if you are now trying to restore contact your motives must be scrutinised. If contact is being refused there must be a good reason for that. You also need to be aware of the techniques they use and the traps they will set you,

- CAFCASS will ask you why you are seeking contact. They may make the feminist assumption that you want to exert control over your children and possibly over your ex, and will use contact to dominate and manipulate. You must reply that you want contact because it is in your child's best interest to have a meaningful relationship with both parents.

- An alternative argument is that you are just trying to get your child support payments reduced.

- They may try to present your relationship with your children, or your wish to have a relationship with your children, as unnatural.

- They may try to turn the most innocent of activities into something more sinister.

- They may present your determination to maintain a relationship as a character flaw.

- They may attempt to show that your child is a victim of 'emotional abuse'. Because there are no recognised diagnostic criteria for this it is an easy allegation to make, and a favourite ploy of CAFCASS and social services.

- The same applies to the diagnosis of 'significant harm' for which there are also no agreed diagnostic criteria. This won't bother them: they will make something up.

- The same also applies to the meaningless mantra of making the child's welfare paramount. Again they will make something up to show you are not acting in the best interests of your children.

- You may find yourself pressured to confess to a false allegation in order to reduce pressure on your child – DON'T DO IT – it will not work and will make your case much, much more difficult to win.

- CAFCASS are not above lying in Court if all else fails.

You simply have to stay calm and persevere, maintaining at all times that it is in your children's best interests to continue their relationship with you, and using the evidence for that which you will find elsewhere in this guide.

8.5.5. The dads' CV

If CAFCASS don't interview you – and even if they do – we would suggest you write and give them a *curriculum vitae* (CV) in which you set out your qualifications and suitability for being a father. Emphasise your involvement with your child's school, on the parent teacher association, with sports or theatre productions, etc.

Perhaps you help run out-of-school activities like rugby coaching, or you are a scout leader. Perhaps you are a teacher.

Concentrate on anything which allows you contact with other children, and show the absurdity of being prevented from having contact with your own.

8.5.6. Making a complaint

The Ofsted reports show that a majority of CAFCASS private law reports are inadequate. A proper complaints system would soon be swamped. Fortunately for CAFCASS only basic factual errors such as names, addresses and dates can be the subject of complaints. Objections to opinions, judgements and conclusions in reports cannot be the subject of complaints and can only be raised in Court, *after* the judge has read the report and potentially already formed an opinion. This means that documents full of errors, opinion and prejudice can be presented to the Court as evidence without correction.

Even the Chief Executive of CAFCASS, Anthony Douglas, admits that CAFCASS is one of the worst public bodies at handling complaints;[286] in an email to staff in December 2010 he wrote that the Parliamentary Ombudsman had observed,

> *we do not give complainants sufficiently direct answers or responses to the questions they put to us, and further, that we refuse to take on board concerns which should be ours administratively rather than those which can be properly referred into the ambit of the court.*

This tendency to pass the buck to the courts means that:

- False allegations are routinely included in these reports.
- FCAs fail to interview all relevant persons.
- Section 7 reports contain opinions – for example on medical matters – beyond the competency of the writer.

The booklet CAFCASS provide on their complaints procedure curtly says that if you are concerned about a decision made in Court as a result of this policy, 'it is best to ask your legal representative, if you have one.'[287]

[286] Camilla Pemberton, *Cafcass chief tells staff to improve complaints handling*, Community Care, 21 January 2011, http://www.communitycare.co.uk/Articles/2011/01/21/116158/Cafcass-chief-tells-staff-to-improve-complaints-handling.htm

[287] CAFCASS: *Your views count*, Paragraph 4.2

A report by the trade union NAGALRO [288] indicated that many CAFCASS managers were actually unaware of the complaints procedure. It also revealed that managers were not trained in the procedure.

An unusual case reveals the sort of things you can successfully complain about. [289] Derbyshire father John Johnstone complained when it became apparent that CAFCASS had done no work on preparing a report following his application for shared residence. Johnstone was given different and conflicting accounts of the work that had been done on the report, CAFCASS claimed a lack of resources and disagreed with the Court on whether a report was needed at all. Over the next 18 months CAFCASS confirmed that they had both received and not received his complaint, and that investigations had been completed, were about to begin or weren't required. At one stage he found that information had been provided on him from a women's aid organisation which 'encouraged an unsupported and untested implication about his character'.

His MP, Heather Wheeler, took the case to the Parliamentary Ombudsman, who ordered CAFCASS to investigate Mr Johnstone's original claim about the way his investigation was handled. The complaint was upheld and he received £250 compensation and an apology.

[288] Eva Gregory and Alison Paddle, *NAGALRO Members Experience Of The CAFCASS Complaints Procedure During 2005/2006*, NAGALRO Council, August 2006
[289] Rob Smyth, *Custody battle dad wins war with children's service,* Burton Mail, 29 July 2011, http://www.burtonmail.co.uk/News/Custody-battle-dad-wins-war-with-childrens-service-29072011.htm

Under Section 9 of the **Human Rights Act 1998** the actions of CAFCASS officers are classed as 'judicial acts' because they are carried out on the instructions of a judge. Claims for damages for human rights infringements can then (in fact must) be brought under Section 7(1)(a) of the Act by way of an appeal. So it is possible when appealing against an adverse residence/contact decision to include a claim for damages for human rights violations by CAFCASS.

Some solicitors have advised parents that if they make a complaint against CAFCASS following a Section 7 report they would lose their public funding. Happily this is not the case. The Legal Services Commission confirms that this would be contrary to parents' Human Rights if public funding were withdrawn simply because they disagreed with a report.

The courts are reluctant to remove a CAFCASS FCA from a case and are likely to view a parent's request to do so with scorn. In Re N (A Child) [2009] EWHC 736 (Fam) the President, Sir Mark Potter, rejected the father's attempt to have the guardian removed from the case, despite the fact that she had been found in contempt,

> *It is important to observe that, in many cases concerning children which come before the court, and in particular that category of cases described as "intractable", one of the parties will be critical and unaccepting of the views expressed, or actions taken, by the guardian on behalf of the child in whose interests she is bound to act. It is equally the position, that in such cases, the criticisms of the guardian will give rise to an asserted loss of confidence on the part of that party which owes more to his or her subjective and inflexible views*

> *than to an objective and rational consideration of the interests of the child concerned. If that frequently encountered situation were sufficient to justify replacement of the guardian in every case where such loss of confidence is asserted, the progress of such cases would become yet further extended and the work of CAFCASS impossible to organise.*

If you want a guardian removed, you will need to demonstrate very clearly that she is guilty of substantial wrongdoing, or that one or both parties has lost confidence to the extent that the proceedings cannot continue without a change of guardian.

Read the Ofsted reports. Understand that the problems with CAFCASS are not individual but institutional. If you manage to have a CAFCASS officer removed from your case another will take her place, and the original one may still manipulate proceedings in the background.

8.5.7. The bottom line

The three fundamental principles of the Children Act 1989 are, first, the welfare of the child; second, the avoidance of delay; and third, the no-order principle.

CAFCASS fails on all three:

CAFCASS does not observe the 'no order' principle. CAFCASS reports can only be written when the Court orders it, so it is not in the interest of CAFCASS that there should not be orders. The more orders, the more work for CAFCASS. However much they complain about being overworked, all state bureaucracies want to increase their workload and their influence. Directing yet another CAFCASS report is often the easiest option for a court which doesn't know what to do next.

CAFCASS does not avoid delay. As Theresa May said, 'CAFCASS is the bottleneck in the system.'[290] CAFCASS reports take months and introduce huge delays in cases between one court hearing and the next. Many cases involve one report after another; CAFCASS reports are habitually poorly written, irrelevant, and biased, and they are thus easily challenged by one or other party, necessitating another report, and further delay. CAFCASS reports are frequently delayed by staff illness or holidays and by staff shortages.

CAFCASS does not promote the welfare of the child. It hides behind this meaningless mantra, and yet its reports are responsible for the huge number of children separated from one or other parent each year. It forgot a long time ago that a child's best interests are usually served by continuing contact with both parents.

If it is at all possible, keep CAFCASS out of your family: they introduce eternal delay and then produce reports which will rarely recommend contact or prevent abuse. Complaint is a waste of time; consign them to the dustbin of history where they belong.

[290] Speech to the 2004 Conservative Party Conference

8.5.8. NYAS

The National Youth Advocacy Service (NYAS) is a charity which can become involved in Family Court cases in the role of Children's Guardians as an alternative to CAFCASS. NYAS are generally viewed with some suspicion by parents as they are yet another part of the system, and are a ruthlessly commercial outfit who see children as exploitable commodities, but they are not necessarily any worse than the appalling CAFCASS, and may give you and your children a marginally better service, they will also usually be able to allocate more time to a case. Particularly in difficult cases where CAFCASS are not helping you towards resolution they should be considered by the Court.

Telephone **NYAS** – on 0800 61 61 01 – and talk to them about your case, and they will tell you if they think they can be of help; you can also email help@nyas.net. They will only become involved if they think they can make a positive contribution. Go into the Court with their phone number so that the judge can speak with them if necessary; if they think they can help NYAS will give you a letter and an information pack which you can then present to the judge. If NYAS become involved you will need the leave of the Court to disclose papers to them.

Consider Lord Justice Wall's comments in **A v A [2004] EWHC 142 (Fam)**:

> *This case demonstrates what can be achieved by intelligent and purposeful social work intervention. The courts cannot expect in every case a service of the quality given to it by NYAS in this case. CAFCASS Reporting Officers in any event have a much more limited role. CAFCASS guardians, no doubt, are more tightly restrained by budgets and workloads. But there is no doubt that the excellent service provided by NYAS in this case was crucial to its successful determination.*

If the other side attempt to involve NYAS it is very probably because they are not satisfied with the CAFCASS report and want another opportunity to exploit the system. Tread carefully.

Note: If CAFCASS are already handling the case NYAS can only become involved if formally appointed by the Court under Family Procedure **Rule 16.3**. In Re B (Contact: Appointment of Guardian) [2009] EWCA Civ 435 proceedings had been continuing for 10 years and the father had no contact. The Court invited NYAS to produce a report on re-establishing contact but they referred him to the FPR rule. The Court rejected the father's application and the Court of Appeal dismissed his appeal.

NYAS can provide advocacy services for children and young people up to the age of 25. Like CAFCASS, they do not operate in Scotland.

8.6. Accessing your Court File

Never think that what you have in your files at home represents everything that is in your court file. In most cases it is not: things like letters between your ex's solicitor and the Court or between your ex's solicitor and CAFCASS may well be missing. You must therefore view your court file regularly so that you can see exactly the same information that the judge making decisions about you and your children has in front of him.

The file should be held at the Court where your last hearing was, though if you have changed courts there may be items missing.

Viewing your file has become increasingly difficult; the old rule 10.20(1) of the Family Proceedings Rules 1991 no longer applies and has not been substituted. Whereas there was once no requirement to give any notice and you could just walk into the Court and demand it, you are now better advised to put your application in writing and to make an appointment; many courts are now demanding this. The letter will be passed to the judge who will make a decision.

If the court staff are obstructive, ask to see the Court Manager; if he is uncooperative ask to see the duty district judge of the day and ask him to order it; you may even have to make an application on **Form FP1** under **Part 19** of the Family Procedure Rules 2011 claiming that it will further the 'overriding objective' of doing justice, by ensuring parties are on an equal footing. If access is still refused you must insist that the judge puts his refusal in writing in the form of an order so that you can then appeal it.

Some judges will expect you to specify exactly what documents you wish to see, but if you don't know what is in the file you are not in a position to be specific. At the Principal Registry in Holborn you will need to see the judge of the day and give your reasons.

On receiving your file we would advise you to inspect it and to ask whether anything has been removed; if it has you must ask for it to be replaced. You must also ask for the judge's comments to be made available. Photocopy all legal certificates because these give an indication of cost which may need to be disputed later. It is a good idea to cultivate one clerk who will treat you respectfully even though you are an LIP.

You will need access to your file regularly as things can be slipped in without notice by the other side.

Any litigant going to court without obtaining access to the file or a transcript if necessary is committing LEGAL SUICIDE.

The story of the disgraceful conduct by Steve Stephenson from *Families Need Fathers* cited above provides a good illustration of why this is so important.

If you do not have a transcript of your judgement then you can order a transcript by completing **Form EX107** at the Court Office which will then send the tapes to your nominated official transcriber. The transcriber has to be paid but the transcript nowadays will be provided in electronic form by email or on disc if requested. If you already have a typescript then it can easily be transformed into a

Word Document by a suitable Optical Character Recognition (OCR) programme.

If you require a transcript of your judgement but do not intend to appeal, make an application under the County Court Act 1984 which allows all transcripts without recourse to appeal.

Obtaining access to your file costs nothing, so you have no excuses for failing to do so!

8.7. Accessing Data

Make a subject access request under the Data Protection Act 1998 to request from CAFCASS, the Social Services, the CSA/CMEC or the police all the information they have on you. If your case is transferred to a different CAFCASS officer you may need to make a subject access request to access the old file. CAFCASS and the CSA/CMEC may well give you the run around; they will certainly ask you for proof of identity. Social Services have been known to claim that their records have inadvertently been shredded.

Here is a sample letter (applications must be by letter, fax or email); many local authorities have their own form letters you will need to complete to access information from the Social Services:

The Data Controller, e.g. CAFCASS Service Manager
Your local CAFCASS/CSA/CMEC office/Your local police authority

Your Address

Today's Date

Dear Sir or Madam,

Heading: [Your full name, plus any reference numbers, police incident numbers, or other information which will identify you and the information you require]

I am writing to you to make a Subject Access Request under section 7(1) of the Data Protection Act 1998 for all of the personal data which you may hold on me.

Under the terms of the Act I am requesting:

- *All of the personal data you have concerning me, irrespective of classification or format;*
- *The purposes for which this data is being held;*
- *The recipients or classes of recipient to whom the data may be disclosed.*

I am especially interested in any material containing opinions about me expressed by members of your organisation about my

person, character, reputation, history or behaviour, whether actual or perceived. This application also covers any other readily available information you may have on me, as prescribed by the Act.

I trust that you will be able to search all of your records comprehensively; to assist you with my application I would suggest that you focus on: [and here give details of individuals in the organisation with whom you have had contact, dates and locations. List visits to their offices, occasions when they visited you, any times you may have been filmed or recorded, all details of telephone conversations and correspondence – this will all be in your Chronology].

As confirmation of my identity I enclose a copy of a utility bill and a photocopy of my passport/driving licence [they don't need this if you are known to them].

[A data controller is not obliged to comply with a request unless he is supplied with such information as he may reasonably require in order to satisfy himself as to the identity of the person making the request and to locate the information which that person seeks]

I enclose a cheque made payable to yourselves for the sum of £10 which is the prescribed maximum under the Act.

If you do not normally handle these requests for your organisation, please pass this letter to your Data Controller or other appropriate official.

I understand that under the Act I should be entitled to an acknowledgement within 7 calendar days and a full response within 40 days (the countdown begins once the data controller has all the information he needs and the fee), and I look forward to hearing from you at your earliest convenience.

Yours faithfully, etc.

Send the letter by recorded delivery and keep a copy. **Note**: If you combine this written request and any other request, for example for video footage, as one request, you will only need to pay one fee of £10. The agency from whom you are requesting information is obliged under the Act to respond within 40 days; note that the countdown starts once they have received your fee and have all the necessary information to identify you and locate the data.

Where data contain the identities of third parties (your children, witnesses, CAFCASS or police officers) the data controller can blank out or remove their names. He is not obliged to release data to you which would reveal the identities of third parties without their consent. In the case of a child this means CAFCASS would ask the other parent for consent to reveal data (your consent is already assumed from the application).

Like schools and doctors, social services can be reluctant to acknowledge a non-resident parent's Parental Responsibility, and will place obstacles in his way. First they will tell him that he has no right to any information on his children they may have; then they will demand he pays for it; then they will say they don't have to provide the information for 40 days using data protection laws as an excuse.

If the information is not provided within the time allowed you should first send a reminder and then commence the complaints procedure for the agency concerned. You can also pursue the matter through the office of the Information Commissioner:

www.informationcommissioner.gov.uk, or 01625 545 745

or contact your MP; in the end you may need to go to court to make them comply. You may even receive damages from them.

Send requests for information from the CSA/CMEC to Data Protection Unit, Room BP6002, Benton Park View, Benton Park Road, Newcastle upon Tyne, NE98 1YX.

8.8. Court Secrecy

There are three aspects to what campaigners call secrecy and what the Government and other apologists are inclined to call privacy or 'confidentiality':

- Restrictions on who may attend hearings;
- Restrictions on who may view court documents and what they can be told about them;
- Restrictions on the publication of information.

8.8.1. Hear no evil

The Family Courts make a distinction between proceedings conducted 'in secret' or *in camera* and those conducted 'in private' or 'in chambers'. Since 'in chambers' is merely a translation of the Latin *in camera* this inevitably causes confusion.

Most proceedings in the Family Proceedings Court, the County Court and the Family Division Family Court hearings are conducted 'in private', and are closed to the public. This is enforced by **Rule 27.10** of the Family Procedure Rules 2010 which also gives the judge discretion to open his court if he chooses. Consider for example Mr Justice Munby's ruling in **Re Brandon Webster (A Child) *sub nom* Norfolk County Council v Nicola Webster & Ors [2006] EWHC 2733 (Fam)** that this rule was designed to make privacy the 'default provision' and was not to be construed as indicating a heavy presumption in favour of privacy. The judge could use his boundless discretion to open his court, though in practice judges are very rarely inclined so to direct. Once media are admitted to a case it can no longer be regarded as being held 'in private'.

There are some orders which must be announced in open court, such as decrees of divorce, committal orders and Non-Molestation Orders. The default position in the High Court, the Court of Appeal and in the Supreme Court is that hearings are open to the public, though most are heard in private.

Under **Rule 27.11** the following people are permitted into the Court:

a) an officer of the Court;

b) a party to the proceedings;

c) a litigation friend for any party, or legal representative instructed to act on that party's behalf;

d) an officer of the service (i.e. CAFCASS) or Welsh family proceedings officer;

e) a witness (but only for the purpose of giving evidence);

f) duly accredited representatives of news gathering and reporting organisations; and

g) any other person whom the Court permits to be present.

Sometimes a lawyer or judge may also have trainees with them.

At any stage of the proceedings, any of the following people may ask the Court to restrict the attendance of any of the persons listed above:

- one of the parties;
- any witness;
- any Children's Guardian;
- a CAFCASS officer, acting on behalf of the child;
- the child, if of sufficient age and understanding.

If he agrees the judge may exclude any of these people from all or part of the proceedings; alternatively he may do so on his own initiative. The Rules allow this if:

- it protects the interests of any child concerned in, or connected with, the proceedings;
- it protects the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness;
- it ensures the orderly conduct of the proceedings; or
- justice will otherwise be impeded or prejudiced.

When proceedings are conducted 'in secret' (or *in camera*) neither the press nor the public may attend; hearings usually heard in secret include,

- All or part of legitimacy hearings;
- Nullity proceedings hearing evidence of sexual capacity;
- Hearings regarding the location of an abductor (to avoid alerting them); and
- Cases involving matters of national security.

In **Re N (A Child) [2009] EWHC 1663 (Fam)** Mr Justice Munby quoted the father's McKenzie, Dr Michael Pelling, that the test for excluding the press must be a high one, 'Mere assertion, speculation and sentiment will no longer do; there must, he says, be real evidence of serious detriment to the child's interests, a party's or witness's safety, the orderly conduct of the proceedings, or to the proper administration of justice (as the case may be) before the presumption of rule 10.28(3)(f) (now rule 27.11(2)(f)) can be reversed.'

The President of the Family Division, Sir Mark Potter issued a *President's Practice Direction*[291] regarding the new rules. When judges are considering whether to exclude journalists he directs that they should

- *specifically identify whether the risk to which such ground is directed arises from the mere fact of media presence at the particular hearing or hearings the subject of the application or whether the risk identified can be adequately addressed by exclusion of media representatives from a part only of such hearing or hearings;*

- *consider whether the reporting or disclosure restrictions which apply by operation of law, or which the Court otherwise has power to order will provide sufficient protection to the party on whose behalf the application is made or any of the persons referred to in paragraph (3)(a) of the rule;*

- *consider the safety of the parties in cases in which the Court considers there are particular physical or health risks against which reporting restrictions may be inadequate to afford protection;*

- *in the case of any vulnerable adult or child who is unrepresented before the court, consider the extent to which the Court should of its own motion take steps to protect the welfare of that adult or child.*

On the practical matter of accommodating reporters Potter directed that court staff should find larger court rooms where possible, but that proceedings should not significantly be disrupted or delayed.

On the matter of impeding or prejudicing justice Potter directed as an example that reporters should only be excluded where a witness (other than a party) will not otherwise give evidence, or where their evidence is likely to be compromised or incomplete. Reasons of administrative inconvenience are not sufficient to justify exclusion.

The courts have also produced a **leaflet EX711** giving more information on attendance by the media.

The result of these changes has been fairly chaotic, with court staff seemingly unaware of them, lawyers resistant to them, and those few journalists who do attend insistent on their new rights.

One significant case set a precedent. **Re Child X (Residence and Contact – Rights of media attendance – FPR Rule 10.28(4)) [2009] EWHC 1728 (Fam)** concerned the young daughter of a celebrity

[291] http://www.familylaw.co.uk/images/Teasers/Media%20attendance%20in%20FPC%2020%20April%202009.pdf

couple. The President, Sir Mark Potter, held that the couple's right to privacy under Article 8 of the European Convention on Human Rights (the right to respect for one's private life) had to be balanced against the freedom of information rights of the media under Article 10 (the right to freedom of expression). Such balancing was not an issue of 'discretion' but one of 'necessity' to exclude under Rule 10.28(4).

Two features of the case influenced his judgement: first that a child psychiatrist feared he would breach his duty of confidence if he gave evidence to the Court in front of the media and that his evidence, and that of the child, would thus be compromised and incomplete. Secondly, the foreign media had taken a keen interest in the case and were not bound by the restrictions on reporting which bound the English media. Potter therefore decided to exclude the media under Rules 10.28(4)(a)(i) and 10.28(4)(b)

Note: that permitting access to the courts by accredited media is still very far indeed from creating a truly open and accountable court system, and does not apply to placement or adoption proceedings. The new arrangements do not yet affect the legislation regarding publication, detailed below, which means that journalists can attend Court and hear the proceedings, but they cannot report what they hear.

Note: that the new rules expressly exempt hearings which are conducted for the purpose of judicially assisted conciliation or negotiation and that media representatives do not have a right to attend these hearings. This is entirely in accord with what campaigners such as Fathers 4 Justice believe; it is only those proceedings in which a judge adjudicates between parties which should be completely open and transparent. Clearly in some proceedings the judge will occupy both roles, and he must direct accordingly that the press be admitted or excluded.

Any party, witness, Children's Guardian or CAFCASS officer can apply to the Court in advance of the hearing and object to the attendance of any person admitted under Rule 27.11(2)(f), and of course the judge retains the unlimited discretion he has always had. This will doubtless ensure that more time is wasted in needless disputation and litigation. Early indications are that lawyers are working hard to marshal arguments by which they may exclude and gag reporters.

8.8.2. See no evil

Thought the media may attend they have no right to receive or view documents relating to the proceedings; if they wish to see any document they must apply to the judge and the judge may use his discretion to grant the application. The fact that a media representative has been allowed to see a document does not confer the right to publish it (see below).

Disclosure of information relating to children proceedings without the leave of the Court is strictly controlled by **Rules 12.72** to **12.75** of the Family Procedure Rules 2010 (FPR 2010). Changes to these rules reflect the changing approach to court secrecy: in 2005 the old rule 4.23 was replaced by rule 10.20A; this was replaced by a new Part XI in April 2009, and the current rules took effect in April 2011; they are identical except in their numbering. They determine to whom information may be communicated,

Rule 12.73 determines to whom information may be disclosed. No information may be disclosed to the public at large or to any section of the public or individual not in the following list, unless the Court permits or directs it. You may communicate information – whether or not contained in your court file – to:

a) a party;

b) the legal representative of a party;

c) a professional legal adviser;

d) an officer of the service or a Welsh family proceedings officer;

e) the welfare officer;

f) the Legal Services Commission;

g) an expert whose instruction by a party has been authorised by the Court for the purposes of the proceedings;

h) a professional acting in furtherance of the protection of children;

i) an independent reviewing officer appointed in respect of a child who is, or has been, subject to proceedings to which this rule applies;

Rule 12.75 determines the purposes for which information may be communicated. You or you legal representative acting on your instructions may communicate information relating to the proceedings to any person where necessary to enable them:

a) by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings;

b) to engage in mediation or other forms of alternative dispute resolution;

c) to make and pursue a complaint against a person or body concerned in the proceedings; or

d) to make and pursue a complaint regarding the law, policy or procedure relating to a category of proceedings to which this Part applies.

Where information is communicated for the purpose of support, advice or assistance, the person to whom it is communicated may not communicate it to anyone else.

Where information is communicated for one of the other reasons it can be communicated to as many other persons as are necessary provided you consent and provided the purpose of forwarding it is the same as the purpose you communicated it to the first person.

The long running case of Re N provides two examples of how the courts interpret the rules. A consent order had been made on the basis that the mother and father attended parenting and therapy classes. In order to expedite matters the child's guardian sought to

brief the therapist by sending her four reports pertaining to the case, rather than the entire bundle, which ran to 6 lever-arch files.

The four reports were: one by the child's guardian, one by a social worker, and one each on the two parents by a psychiatrist. The reports were contentious and the father did not accept much of their content; in particular he considered the psychiatrist's methodology flawed and his report to be biased in favour of the mother. Aware of his objections, the guardian sent the reports while the father was away on holiday.

On learning on his return that the reports had been sent, the father sought the committal for contempt of the child's guardian and solicitor (Re N (A Child) [2009] EWHC 736 (Fam)).

The solicitor had advised the guardian that the court's consent for disclosure was not necessary according to the table provided in the Family Proceedings Rules (FPR): she represented the child and was therefore 'a party'; she believed the therapy provider was 'a body providing counselling services for children or families' or a 'mediator' for the purpose of 'mediation in relation to proceedings'. On the father's application she conceded that these conditions did *not* apply: the therapy in question was to enable the parents to communicate better and did not constitute 'mediation'; the provider did not qualify as a 'mediator' under the terms of the FPR. She also conceded that the therapy would not 'enable the party or any child of the party to obtain health care or counselling' since it was the parents of the party to whom the therapy would apply.

The solicitor then relied on the old Family Proceeding Rule 10.20A (Communication of Information relating to Proceedings) which provided that: '(2) For the purposes of the law relating to Contempt of Court, information relating to the proceedings (whether or not contained in a document filed in court) may be communicated – (c) Where the communication is to, (vii) an expert whose instruction by a party has been authorised by the court.' This provision now comes under Rule 11.2(1)(a)(vii).

The President, Sir Mark Potter, ruled that the therapist was *not* engaged as an 'expert' 'instructed or intended to be instructed by a party to report for the purposes of participation in the proceedings' but rather 'a body or individual consulted by the parties as providers of therapeutic services outside the confines of the proceedings or the control of the court'. Thus contempt *had* been committed but 'unwittingly' and with 'benign intention' and it would not be 'appropriate or constructive to impose any penalty'. The outcome was that the ordered therapy would be conducted by an alternative provider, one whose perception of the case had not been prejudiced by the 4 contentious reports which were to be returned to the father.

The father then wished to make a complaint to the General Medical Council (GMC) concerning the psychiatric report: the expert witness had failed to gather sufficient information to make an assessment, showed bias towards the mother and disregarded concrete evidence.

In order to make the complaint it was necessary to disclose to the GMC numerous documents in the case, including the reports on both parents, the letter of instruction, the father's statement, and the father's critique of the expert's methodology.

The original application to disclose had been made under the old rules; under the new rules the court's leave to disclose was no longer required, but the father nevertheless made the application to provide the other parties with the opportunity to oppose: **Re N (A Child) [2009] EWHC 1663 (Fam).** Not surprisingly, the mother and the child's guardian chose to oppose disclosure.

Mr Justice Munby provided a review of the legislation in this area. He concluded that the new rule 'imposes no limitation whatever' either on

- 'The subject matter or nature of the complaint'; or
- 'The form the complaint may take'; or
- 'The person, body or organisation to whom the complaint is made';
- Or the persons or bodies about whom the complaint is made.

He observed that while the word 'complaint' is obviously intended to be limited to complaints made to disciplinary or regulatory bodies there is nothing in the wording of the legislation to impose this limitation.

Complaints may be made, therefore, to Members of Parliament, peers, the police, the media, campaign organisations, and to anyone else. The only limitation is that the complaint must be against a person in some way 'concerned in' the proceedings.

The other limitations imposed by the new rule are that in order to make the complaint the disclosure of the information must be 'necessary' (and Munby explores the legal implications of the word); that the recipient of the information is bound by rule 11.4(3); and that the information may not be put into the public domain.

Munby concluded that the father required no consent from the Court or from the other parties to disclose, nor did he need to inform them of disclosure. Accordingly he made no order, other than to release the father from his earlier Undertaking not to disclose.

The rules as set out in **Practice Direction 12G** expressly permit the communication of 'any information relating to the proceedings' by 'a party' to the proceedings to a 'lay adviser, McKenzie Friend, or a person arranging or providing pro bono legal services' 'to enable the party to obtain advice or assistance in relation to the proceedings'. The discussion must be confidential. A lay adviser is defined by the rule as 'a non-professional person who gives lay advice on behalf of an organisation in the lay advice sector' and McKenzie friend as 'any person permitted by the court to sit beside an unrepresented litigant in court to assist that litigant by prompting, taking notes and giving him advice'.

> ***2.1.*** *A person specified in the first column of the following table may communicate to a person listed in the second column such information as is specified in the third column for the purpose or purposes specified in the fourth column.*

Communicated by	To	Information	Purpose
A party	A lay adviser, a McKenzie Friend, or a person arranging or providing pro bono legal services	Any information relating to the proceedings	To enable the party to obtain advice or assistance in relation to the proceedings.
A party	A health care professional or a person or body providing counselling services for children or families		To enable the party or any child of the party to obtain health care or counselling
A party	The Child Maintenance and Enforcement Commission, A McKenzie Friend, a lay adviser or the First-tier Tribunal dealing with an appeal made under Section 20 of the Child Support act 1991		For the purposes of making or responding to an appeal under Section 20 of the Child Support Act 1991 or the determination of such an appeal
A party	An adoption panel		To enable the adoption panel to discharge its functions as appropriate
A party	The European court of Human Rights		For the purpose of making an application to the European court of Human Rights
A party or any person lawfully in receipt of information	The Children's Commissioner or the Children's Commissioner for Wales		To refer an issue affecting the interests of children to the Children's Commissioner or the Children's Commissioner for Wales
A party, any person lawfully in receipt of information or a proper officer	A person or body conducting an approved research project		For the purpose of an approved research project
A legal representative or a professional legal adviser	A person or body responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers		For the purposes of the investigation or determination of a complaint in relation to a legal representative or a professional legal adviser
A legal representative or a professional legal adviser	A person or body assessing quality assurance systems		To enable the legal representative or professional legal adviser to obtain a quality assurance assessment

A legal representative or a professional legal adviser	An accreditation body	Any information relating to the proceedings providing that it does not, or is not likely to, identify any person involved in the proceedings	To enable the legal representative or professional legal adviser to obtain accreditation.
A party	A police officer	The text or summary of the whole or part of a judgement given in the proceedings	For the purpose of a criminal investigation.
A party or any person lawfully in receipt of information	A member of the Crown Prosecution Service		To enable the Crown Prosecution Service to discharge its functions under any enactment.
A Welsh family proceedings officer	A person or body exercising statutory functions relating to inspection of CAFCASS CYMRU	Any information relating to the proceedings which is required by the person or body responsible for the inspection	For the purpose of an inspection of CAFCASS CYMRU by a body or person appointed by the Welsh Ministers.
An officer of the Service or a Welsh family proceedings officer	The General Social Care Council or the Care Council for Wales	Any information relating to the proceedings providing that it does not, or is not likely to, identify any person involved in the proceedings	For the purpose of initial and continuing accreditation as a social worker of a person providing services to Cafcass or CAFCASS CYMRU in accordance with section 13(2) of the Criminal Justice and courts Services Act 2000 or section 36 of the Children Act 2004 as the case may be.
	A person or body providing services relating to professional development or training to Cafcass or CAFCASS CYMRU	Any information relating to the proceedings providing that it does not, or is not likely to, identify any person involved in the proceedings without that person's consent	To enable the person or body to provide the services, where the services cannot be effectively provided without such disclosure.
	A person employed by or contracted to Cafcass or CAFCASS CYMRU for the purposes of carrying out the functions referred to in column 4 of this row.	Any information relating to the proceedings.	Engagement in processes internal to Cafcass or CAFCASS CYMRU which relate to the maintenance of necessary records concerning the proceedings, or to ensuring that Cafcass or CAFCASS CYMRU functions are carried out to a satisfactory standard.

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A party or any person lawfully in receipt of information relating to the proceedings	A Minister of the Crown with responsibility for a government department engaged, or potentially engaged, in an application before the European Court of Human Rights relating to the proceedings	Any information relating to the proceedings of which he or she is in lawful possession	To provide the department with information relevant, or potentially relevant, to the proceedings before the European Court of Human Rights.
A Minister of the Crown	The European Court of Human Rights		For the purpose of engagement in an application before the European Court of Human Rights relating to the proceedings.
	Lawyers advising or representing the United Kingdom in an application before the European Court of Human Rights relating to the proceedings		For the purpose of receiving advice or for effective representation in relation to the application before the European Court of Human Rights.
A Minister of the Crown or a Welsh Minister	Another Minister, or Ministers, of the Crown or a Welsh Minister		For the purpose of notification, discussion and the giving or receiving of advice regarding issues raised by the information in which the relevant departments have, or may have, an interest.

5.2. *A person in the second column of the table may only communicate information relating to the proceedings received from a person in the first column for the purpose or purposes-*

a) for which he received that information; or

b) of professional development or training, providing that any communication does not, or is not likely to, identify any person involved in the proceedings without that person's consent.

Note: that under the new rules the recipient of information about your case is able to pass that information on to a third party, provided it is for the same reason that the information was disclosed to him in the first instance.

The courts have produced a **leaflet EX710** setting out the rules about to whom you can reveal what information.

If you are in any doubt about whether communication of documents in your case is permitted under the rules you are strongly advised to seek the consent of the court.

8.8.3. Speak no evil

The media may report to the public what takes place in a court of law unless publication is prohibited by statute law or by a court order.

Publication of the details of proceedings held in private and conducted under the Children Act 1989 or Adoption and Children Act 2002 or which 'otherwise relate wholly or mainly to the maintenance or upbringing of a minor' is prohibited by **Section 12** of the Administration of Justice Act 1960. Section 12 prohibits publication of any account of proceedings, of any documents (other than the order) or extracts or summary of those documents; any breach is a Contempt of Court.

It is questionable whether proceedings can still be said to be 'in private' when the media are in attendance and whether, therefore, Section 12 still applies. This question has not yet been resolved by case law.

'Publication' means making information public, which includes putting information on Facebook, sending a text message or purely oral communication to any third party. Courts 'sitting in private' include those into which accredited press are allowed but which still exclude the general public. Section 12 prevents publication of,

- what goes on in front of the judge sitting *in camera*;
- documents filed in court such as position statements, witness statements, reports, and legal arguments;
- transcripts or notes of evidence, submissions and judgements; and
- extracts, quotations and summaries of such documents, whether anonymised or not.

Section 12 does ***not*** of itself prevent publication of any of the following:

- the fact that a particular child is subject to Children Act proceedings or proceedings relating to his maintenance or upbringing (this is prevented by s.97 Children Act);
- the nature of the dispute (as opposed to a summary of the evidence);
- the identity of the parties and witnesses, and of the party on whose behalf a witness has given evidence (this also is prevented by s.97 where it can lead to identification of the child); and
- the text of any order made.

There is no time limit to this prohibition and Section 12 remains in force indefinitely after the completion of proceedings. Breach is a Contempt of Court and is punishable by a fine or imprisonment for up

to 2 years. The Court must first warn you of the consequences of breach and make an injunctive order with a penal notice attached.

Section 97 of the Children Act 1989 prohibits the publication of any material intended or likely to identify a child involved in proceedings under the Children Act or the Adoption and Children Act 2002 in a Magistrates' Court, County Court or High Court. It also prevents identification of the child's home address or school.

The prohibition was extended from application merely in the Magistrates' Court by the paradoxically named Access to Justice Act 1999, following the cases brought at the European Court of Human Rights by Dr Michael Pelling and Andrew Bayram and in defiance of Article 17 of the Convention, 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.' S.97 does *not* extend to the Court of Appeal.

The default position of the courts is that children should remain anonymous unless it can be shown to be in their interest for anonymity to be lifted. As with the rules on access, there is a get-out clause: Section 97 of the Children Act also states, '(4) The court or the Secretary of State may, if satisfied that the welfare of the child requires it, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order'. This means that a judge can decide to publish a judgement – usually to counter allegations of a miscarriage of justice – while the parties affected by it are obliged to remain silent.

To some extent Section 97 merely confirms what was already law: Section 39 of the Children and Young Persons Act 1933 forbids publication of the name, address, or pictures of a child who is the subject of proceedings, or of particulars 'calculated to identify' him or her.

Section 62 of the Children Act 2004 relaxed the s.97 rules on publication by amending them to cover publication only 'to the public at large or any section of the public'. To five other Acts it appended the clause, 'Rules may, for the purposes of the law relating to Contempt of Court, authorise the publication in such circumstances as may be specified of information relating to proceedings held in private involving children.' Such relaxation of the rules tends to apply to the Court rather than to the parties themselves.

The important ruling in Clayton v Clayton [2007] 1FLR 11 CA was that unlike Section 12 this prohibition for the duration of the proceedings, and that once the case is concluded it is no offence to identify the child. The prohibition provided by Section 12AJA, however, *does* remain in force. The Court may also apply a further injunction in order to continue the s.97 protection if it considers it necessary.

Breach of Section 97 is a criminal offence and the Court does not need to warn you or apply a penal notice. Breach is common, but so far as we can tell there has never been a successful prosecution. You are therefore free to discuss your case with whom you like and to publish or broadcast it with near impunity.

8.8.4. Other prohibitions

The **Judicial Proceedings (Restriction on Reports) Act 1926** prevents publication of anything except:

1. The names, addresses and occupations of parties and witnesses;

2. A concise statement of charges, defences and counter charges (or equivalent);

3. Submissions on points of law arising;

4. The judge's summing up;

in the following types of case:

- Proceedings for nullity, dissolution of marriage and judicial separation;

- Financial proceedings under the Matrimonial Causes Act 1973;

- Declarations of marital status, parentage and legitimacy under the Family Law act 1986.

In the case of Clibbery v Allen Thorpe LJ gave it as his provisional view that the 1926 Act no longer applied to ancillary relief cases.

Section 71 of the **Magistrates' Courts Act 1980** determines that the same information as points 1 to 4 above may be reported in the Family Proceedings Courts.

Section 39 of the **Children and Young Persons Act 1933** gives the Court jurisdiction to restrict the details, including photographs, which may lead to the identification of a child involved in proceedings.

Section 11 of the **Contempt of Court Act 1981** allows the Court to withhold names or other details from the public in proceedings in which those names or details have been withheld in open court. Where the names or details have been disclosed in open court the Court cannot prevent their further publication under this Act.

Financial information which the parties have been compelled to disclose as part of ancillary relief proceedings is also protected from publication under an 'implied undertaking' unless it has fallen into the public domain. It is still an open question whether information disclosed in open court is then to be regarded as in the public domain.

8.8.5. Discussion

The judiciary have been particularly keen to prevent the naming of children and parties in Children Act cases. This was encouraged by the former President of the Family Division, Dame Elizabeth Butler-Sloss, who during her time in the Court of Appeal from 1988 introduced the rubber-stamp system of anonymity in child and even non-child family cases in the Court of Appeal – to the extent that court staff were instructed to tack non-identification injunctions on orders even when the judges had not made them (See Re R (Minor) (Court of Appeal: Order Against Identification) [1999] 2FLR 145).

This rubber-stamping was ruled not convention-compliant in 2004 in Pelling v Bruce-Williams, (Secretary of State for Constitutional Affairs intervening) [2004] Fam 155, [2004] 3WLR 1178, [2004] 3AER 875, [2004] 2FLR 823, CA and the Court must now properly consider competing interests under Articles 6, 8 and 10.

Article 6(1) of the European Convention on Human Rights demands that 'judgement shall be pronounced publicly'. There is no restriction or qualification to this, and thus the refusal of the Family Courts to publish judgements (other than anonymised ones in carefully chosen cases) would appear to be a breach of this Article. However in the Court of Appeal precedent Re P-B (Minor) (Child Cases: Hearings in Open court) [1997] 1AER 58, [1996] 2FLR 765, CA the Court of Appeal found that the practice of hearings in chambers with secret judgements was lawful, and Convention compliant. ECHR judgements, incidentally, can be published, with names, in the UK.

The present interpretation of the restriction under Section 97 is that it applies only while the case is 'live', that is, until the final order is made by the Court. Lord Justice Wall's Court of Appeal ruling in Clayton v Clayton[292] confirmed this, though the Labour Government twice tried to reverse it (see below).

Clayton did *not* overturn Section 12 AJA which still stands, as confirmed by Munby's decision in Re B (A Child) (Disclosure) [2004] 2 FLR 142; thus parties and journalists may publish that a particular child was involved in proceedings once they have concluded but not the substance of the case.

National newspapers routinely breach these rules but when the attention of the Attorney General has been drawn to this no action has been taken, and it seems to be the case that there has never been a successful prosecution.

The irony of the 1989 legislation is that it was introduced shortly after the Cleveland child sex abuse scandal (see our dossier *Family Justice on Trial*) had highlighted how in the absence of public accountability or professional scrutiny the powers of certain professional groups in the UK could be misused and abused. The legislation had already been decided before the scandal broke, but by excluding public inspection it has actually made accountability *less* possible and such scandals *more* likely.

The Children Act 1989 reduced the draconian powers available to local authorities under the Children and Young Persons Act 1969 and led to

[292] Clayton v Clayton [2006] EWCA Civ 878

a short-lived fall in the numbers of children taken away from their families, obliging social services departments to engage more with families, but it failed to understand the abuses of power enabled by the lack of accountability.

Even if one accepts that the identity of a child involved in family proceedings should be concealed – and there is no good reason for doing so – it is clear that it is Section 12 of the Administration of Justice Act 1960 which is continuing to cloak in secrecy the substance of what takes place in Family Courts and that it requires urgent reform. What reporters *can* report is the nature of the proceedings – that they concern the mistreatment of a child, for example – and the identity of an expert witness who gave evidence. Even where reporters are allowed into the courtroom, however, they may not report what took place, even on evidential or procedural issues which do not directly relate to the child.

Section 12 is the difference between open and transparent justice in our civil and criminal courts and secret, unaccountable justice in our Family Courts. It obliges us to trust that judges, expert witnesses and social workers can perform their jobs effectively and fairly without transparency, accountability, scrutiny or debate. Manifestly we cannot do so.

8.8.6. Justifying secrecy

The assumed reason for such privacy, which we would more honestly call secrecy, is that it protects children from being in some way damaged or traumatised by media exposure, despite the complete absence of evidence that any child has ever been damaged in this way. This was accepted by the Court of Appeal in Pelling v Bruce-Williams which said (our emphasis),

> *We have considerable sympathy for Dr Pelling's basic premise that the rationalisation of the current practice is expressed in very general terms that* ***certainly appear to lack evidential foundation.***

Other reasons given are that the media will only express interest in notorious cases and thus give the public a distorted view of court operations, or that openness will result in the disruption of the court system through the additional demands made on court staff and facilities and that judges will worry more about protecting themselves than about protecting children.

The official explanation for secrecy is entirely different: it is that to have proceedings in an open court would severely inhibit the parties and witnesses and thus compromise the process of justice. Again there is no evidence that this is the case, and the argument was refuted as long ago as 1913 when in Scott v Scott Lord Atkinson said,

> *The hearing of a case in public may be, and often is, no doubt, painfully humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trials is to be found, on the whole, the best security for the pure, impartial, and efficient*

> *administration of justice, the best means for winning for it public confidence and respect.*

The author of a report into the Ohio Family Court system[293] explains the real reasons for secrecy very clearly,

> *The pretense for this secrecy is to protect families from embarrassing disclosures about their personal and private lives. The real function, however, is to protect the Court from public scrutiny and oversight.*

In Britain the reason for secrecy is the same: it protects indolence, cronyism, incompetence, false beliefs and extreme ideologies; it has become a habit which no one is very keen to question:

> *In the end the more convincing defence of the practice in our jurisdiction may be the most simple, namely that it is reflective of a long standing tradition, of general but not universal application, that has been franked by the European Court as Convention compliant.*[294]

It should shock you that the UK operates secret courts. The situation is scandalous and untenable. There is thus no scrutiny of the courts by any outside agency and its staff are entirely unaccountable. There is no effective appraisal or disciplinary system for judges whose positions are almost impregnable. There is no way to ensure that expert witnesses, protected by anonymity, do not pursue personal obsessions and ideologies. It is rumoured within the legal profession that mediocre judges are sent off to the family division where their nearly infinite discretion makes a thorough knowledge of the law unnecessary and miscarriages of justice are regarded as no more than occupational hazards.

No data comes out of the Family Courts on the outcomes for children, on compliance with orders, the effectiveness of orders, the distribution of residence or the criteria used to sunder a child from his parent. Academics can conduct no adequate research and judgements are thus made on the basis of laziness, prejudice and habit, rather than on any sound evidential ground.

8.8.7. A false dawn

In December 2008 the Labour Government announced a new approach to openness in family law through the publication of *Family Justice in View*.[295] This document professed, 'We propose to change the law to allow access to the Court so that family justice can be seen', and it is in the light of this that the new arrangements must be understood which have allowed access to the Family Courts by accredited journalists since April 2009. The reason for these changes is primarily to reverse the loss of public confidence in the courts, and

[293] Michael A. Fox, *A culture of secrecy, fear and judicial abuse: a report on the Butler County juvenile and domestic relations courts*, November 2004

[294] Dr Michael John Pelling, Appellant v Mrs Veronica Nana Bruce-Williams, Respondent; Secretary of State for Constitutional Affairs, Interested Party [2004] EWCA Civ) 845, http://www.hmcourts-service.gov.uk/judgmentsfiles/j2637/pelling-v-bruce_williams.htm

[295] *Family Justice in* View, The Ministry of Justice, December 2008, http://www.justice.gov.uk/consultations/docs/family-justice-in-view.pdf

the desire to protect the courts from scrutiny and its personnel from accountability remains.[296] These are the main changes introduced:

8.8.8. Access by the media

This is the change described above under Secret Hearings. Broadly it follows the model adopted in 2005 by the New Zealand Family Court under the Care of Children Act 2004. This arrangement demands that journalists and the organisations they work for be properly accredited. Journalists may not identify the children, parents, other parties such as supporters, witnesses or 'speakers on cultural issues' (i.e. issues concerning Aborigines). Penalties for breaching the reporting restrictions are up to a 3 month prison sentence or $2,000 fine for individuals and up to a $10,000 fine for companies.

The response from the New Zealand media was less than overwhelming. In the first 12 months after the Act there were 40 requests to attend, which resulted in only 12 instances when a journalist was recorded as attending, 20 instances when no journalist attended, and 8 where media attendance was not recorded.[297] Journalists who sat through hearings did not find them particularly news-worthy and did not witness the bias and prejudice they had hoped for. It is not good use of a journalist's time to sit, possibly for days, through such a hearing.

A study[298] in March 2007 by Ursula Cheer of the University of Canterbury in New Zealand reported there had been no increase in the level of reporting on custody proceedings since journalists had been allowed in and that opening the Family Court to media scrutiny had done little to improve public understanding of the process. One reporter stated,

> *Because the limitations of reporting mean we can't be open, we don't go. What we have is a half-arsed approach to the Family Court. We can see a little bit but can't report most of it.*

Our scepticism seems to be confirmed by the BBC journalist Sanchia Berg who spent two weeks in the UK Family Courts following the changes and produced a report for Radio 4's *Today* programme headed, *Family Court doors remain closed.*[299] She said, 'because I wasn't allowed access to the experts' reports – so far no-one has – I could not really assess the case for myself… I didn't have the full picture. Jeremy Rosenblatt, a leading barrister in the Family Courts, told me that no journalist could fully grasp a case without those expert reports'.

A possible consequence of this move in the UK is that incompetent social workers and expert witnesses who can now hide behind anonymity will in future be named publicly. Needless to say this proposal has met with hostile criticism from groups representing social

[296] See Justice Minister Jack Straw's statement, Family justice in view, 16 December 2008, http://www.justice.gov.uk/news/announcement161208a.htm
[297] NZ Ministry of Justice

[298] Cheer, U., Caldwell, J., and Tully, J., *The Family Court, families and the public gaze*, University of Canterbury, NZ, March 2007.
[299] Sanchia Berg, *Family Court doors remain closed*, BBC, 24 June 2009, http://news.bbc.co.uk/today/hi/today/newsid_8105000/8105277.stm

workers. It is likely that any information which makes it to the light of day will have been carefully censored.

Because the changes so far only apply to the Family Proceeding Rules they only affect attendance and have no bearing on reporting. Thus journalists are able to attend (if the judge approves and the parties do not object) but they are not able to report on proceedings, other than in a very generalised way, and even then, only with the court's consent.

Two other minor changes were introduced under this reform. The first enabled parties to disclose more information than previously for the purposes of seeking advice or support, mediation or the investigation of a complaint. They were also enabled to disclose anonymised information for the purposes of training and research.

The second introduced a pilot scheme under which courts in Leeds, Wolverhampton and Cardiff can 'routinely' produce 'a written record of the decision'. In selected cases they can publish the anonymised judgement online. These judgements have been, as former Justice Minister Jack Straw admitted, carefully selected and it is difficult to see, therefore, how this measure can restore confidence.

8.8.9. Confidence trick

In the 2009 Queen's Speech the Labour Government committed itself to a Children, Schools and Families Bill[300] which, it claimed, would 'continue' the relaxation of reporting restrictions, allowing journalists to report more detail of proceedings and possibly to report some of the documents in cases. Part 2 of the Bill was passed by the Lords on 7th April 2010, and it received Royal Assent on the 8th, just before the dissolution of Parliament on the 12th in readiness for the General Election.

The Bill would have repealed both Section 12(1)(a) of the Administration of Justice Act 1960, which prohibits the publication of information relating to child proceedings heard in private, and Section 97 of the Children Act 1989, which makes it a criminal offence to publish information identifying or likely to identify a child as subject to proceedings.

The Bill would have replaced this legislation with a general prohibition on the publication of information from family cases conducted in private (i.e. from which the general public are excluded), *whether child related or not*. The definition of information would have included identification information where the Access to Justice Act did not, and under s.32(1) the prohibition would have included concluded cases, *and thus reversed Clayton v Clayton and closed the loophole*.

[300] http://www.publications.parliament.uk/pa/cm200910/cmbills/008/10008.i-iii.html

Section 32(2) would have created a new statutory contempt covering publication of information unless one of three criteria could be met:

1. publication is 'an authorised publication of the text, or a summary, of the whole or part of an order made or judgment given by the Court in the proceedings.'

   This would have permitted the identification of a child provided the text or summary contained the name of the child and provided the Court did not expressly prohibit publication. This would have made the right to identify a child arbitrary, and it is likely that judges would simply have removed children's names from their judgements.

2. publication is by an authorised news publication, but a further condition of this was that the information published could not be identification information.

3. publication is authorised by a rule of court (currently there are no such rules of court).

The Act was far more restrictive than the law it was to replace, and its effect would have been to make identification of parties, witnesses (other than expert witnesses) and children or disclosure of substantive information in most kinds of family proceedings a Contempt of Court. Thus not only Clayton v Clayton but also Clibbery v Allen [2002] 1FLR 565 CA would have been reversed.

Publication of the text or summary of all or part of a judgement in non-child proceedings which is currently permitted would be subject to publication only by leave of the Court. The only information a party could publish would be worthless trivia, because they would not have been able to include any information likely to identify themselves, other parties or the child concerned.

Accredited news organisations would require leave of the Court to publish adoption orders, identifying orders or judgements. No identification information, or personal information without identification could have been published without leave of the Court. News organisations could not acquire information they did publish from a party; it could only have been acquired by being present in Court. At present the media are free to publish any information on non-child proceedings from any source without being present in Court (as established in Clibbery v Allen); under the new rules they would have lost this freedom, and Ms Clibbery would no longer have been able to talk to the press about her case or publicise any injustice suffered.

Labour's professed opening up of the Family Courts was revealed as a cruel hoax: a confidence trick, while Jack Straw's pledge on ITV[301] not to reverse Clayton was exposed as a lie. In the words of *Times* legal editor Frances Gibb, family law would have taken 'a long, long step backwards'.

Little of this would have made much difference to you as a litigant. You would probably still talk to whom you want and get advice and support wherever you could get it without considering the strict legality. As we noted above, no one has been successfully prosecuted

[301] ITV, *This Morning*, 27 April 2009,

under the existing legislation. The 'Clayton loophole' has rarely been exploited, as the media are usually far too timid to risk breaking the law, though when they do, it is with cavalier disregard and complete impunity. Being able to study more case precedents may help you, but it isn't yet clear what form these will be in.

At the time of writing this legislation has been widely criticised – largely by sections of the family justice system who don't appear to comprehend its implications – and has been kicked into the long grass. If there are to be any changes to the rules on confidentiality and transparency they will be made as part of the reforms introduced by the Family Justice Review; although this formed part of the panel's remit, in the *Interim Report* they concluded,

> *None of our recommendations affects, or needs to affect the openness or otherwise of the family courts.*

8.9. Cases

Secrecy

Scott v Scott [1913] AC 417
X v Dempster [1999] 1FLR 894 FD
P v UK [2001] 2FLR 261
Kent County Council v Mother, Father and B [2004] EWHC 411 (Fam)
P v B W (Children Cases: Hearings in Public) [2004] 1 FLR 171
Dr Michael John Pelling, Appellant v Mrs Veronica Nana Bruce-Williams, Respondent; Secretary of State for Constitutional Affairs, Interested Party [2004] EWCA Civ 845
Re S (Minor) (Identification: Restrictions on Publication) [2004] HL 28/10/04
Re B (A Child) (Disclosure) [2004] 2 FLR 142
Clayton v Clayton [2006] EWCA Civ 878
Re Brandon Webster (A Child) sub nom Norfolk County Council v Nicola Webster & Ors [2006] EWHC 2733 (Fam)
Re Child X (Residence and Contact – Rights of media attendance – FPR Rule 10.28(4)) [2009] EWHC 1728 (Fam)

Transfer between courts

C v Solihull MBC [1993] 1 FLR 290
L v Berkshire CC [1992] 1 FCR 481
R v South East Hampshire FPC ex parte D [1994] 1 WLR 611
Re A & D (NAI: Subdural haematoma) [2002] 1 FLR 337

CHAPTER 9: PROCEDURE

It is truly a sorry state of affairs when a justice system that is founded on the paramountcy principle is unable to secure a Guardian to guide the Court how to achieve its ultimate goal by making orders that are in the best interests of the children.

Lucy Reed, barrister

9.1. Basic Stuff

9.1.1. Tips before court

Read everything in this e-Book. Twice.

- Compile a **Chronology** of everything: every incident, conversation, phone call, email, contact visit, court appearance.
- Acquaint yourself with all the legislation and case law relevant to your case.
- Let the Court know in advance of your McKenzie's attendance; do this a couple of days in advance by fax and always take a copy with you.
- Bring your McKenzie but do not bring the whole family and all your friends; it will be presented to the judge as an attempt to intimidate. Do not take your children.

- Take only what you need, you don't want to be stopped at the metal detector or have items removed when you are searched.

- Take an umbrella – you don't want to arrive sopping wet – and make sure your documents are in a waterproof case.

- Take a pad of blank paper and pens – you will need to take notes; you can also pass notes to your solicitor if he is doing the talking.

- Take your bundle, and if you bring any documents the other side has not yet seen take 3 copies. Make sure the order with your case number on it and time of the hearing is in the bundle.

- Don't make any other plans for later in the day; you may well be seen late and could be in discussions for hours. Make sure to arrange with someone else to collect your children from school, and fill the parking meter for the whole day. Take money to buy food and drink and take a good book.

- Courts can be hot and stuffy; keep drinking fluids, you don't want a headache on top of everything else. Courts can also be very cold.

- Turn up on time; you should really get to Court at least an hour before the hearing is listed to allow for delays and to give yourself a chance to talk things over with your McKenzie Friend and to CAFCASS, if they attend. Allow for delays, traffic jams, problems with parking, cancelled trains, etc.

- Make sure you know where you are going; don't go to the Crown or County Court if your hearing is in the Magistrates' Court; don't rely on your taxi driver to know the difference.

- If you arrive early, use that time profitably. Discuss your plan of action with your solicitor or McKenzie. If the other team arrive early, get your solicitor or McKenzie to negotiate with them. If you can agree – say – a schedule of contact, you can have it made up into an order when you get into the courtroom and save a great deal of time, money and further hearings.

9.1.2. Tips in court

- Turn off your mobile phone.

- Do not lose your cool.

- Act with dignity and integrity and address the judge respectfully.

- Always stand when the judge enters or leaves; you may not have much respect for him or her, but there is no point in needless incivility or aggravation.

- Sit quietly and as relaxed as you can, feet on the floor and hands on the desk in front of you.

- Don't write furiously while someone else is speaking: get your McKenzie to take notes for you.

- Don't show any reaction to whatever someone else says, however untrue or malicious.
- Don't glare at the other party, whatever the provocation; it will be seen as intimidation.
- Don't denigrate the other party – try to sing their praises as a good parent and concentrate on the positives rather than on the bad things; they won't do this for you.
- Don't stare at any one person in Court; keep your gaze moving from the judge to the other party, to solicitors, CAFCASS, etc.
- When you have to speak, address what you have to say to the judge. It shows respect and he is the one deciding whether you are credible or not; you will also not be distracted by the reactions of others in the courtroom.
- Understand that there is nothing more the other party's legal team would rather do than get you upset and have you come across to the judge as angry or aggressive, so the first rule of thumb is, treat the other party's legal team with nothing but respect.
- Do not allow the other party or their representatives to put you into any position where you respond in an angry, smart aleck or snide manner. Regardless of how they may behave, you must remain calm and keep what you say short and sweet. If you can do that, when the other side attempts to rile you, the judge will see them as the villains and not you.
- Concentrate on your belief that children should have two equally committed, equally responsible parents.
- Go into Court and headline the positive outcomes that you want to achieve. Make sure you have everything you want to accomplish set out clearly and written down in front of you. Under pressure it is easy to forget what you want to say.
- Make sure you have a **parenting plan** worked out in advance.
- If it is your application it is your right to speak first – do not be bullied by the respondent's barrister who will want to get their case in before yours.
- If you need more time – perhaps to understand a document you have just been given – ask for the hearing to be put back in the list (i.e., heard later that day) or, if absolutely necessary, to be adjourned to another day. Don't allow yourself to be rushed into anything.

9.1.3. Dressing for court

It doesn't really matter how you dress for Court. Many people will wear suits but it won't help them any more than wearing jeans and a tee-shirt. Wear whatever you are comfortable in; you don't want to be self-conscious about sweat stains because you are too hot or nervous. If you don't respect the Court, then don't wear a suit; if you belong to a campaign group and want to show your allegiance, do so. If you are a father, you may be inclined to think that if you were to dress as a

woman the Court will treat you more favourably. This has been tried, but wasn't altogether successful. If you are attending Court on behalf of someone else check with them how they want you to dress – they may not appreciate the Batman costume.

9.1.4. Addressing the court

How you address the Court depends upon the level of the Court you are attending,

- In the Magistrates' Court you should address magistrates as 'Your Worship', 'Sir' or 'Madam';
- Deputy and District Judges are addressed as 'Sir' or 'Madam';
- Circuit Judges and Recorders are addressed as 'Your Honour';
- High Court judges and judges in the Court of Appeal and Supreme court are addressed as 'My Lord' ('M'Lord') or 'My Lady' ('M'Lady');
- Solicitors tend to refer to each other as 'my friend', and barristers as 'my learned friend', but as an LIP you need only call them Mr or Mrs X; in this context 'my learned friend' would sound facetious, so avoid it;
- You can refer to your ex by their name, Mr or Mrs Y, or as 'the respondent' (or 'the applicant' where appropriate).

9.1.5. What the court expects

Notwithstanding its inability to maintain any standard that those who pay for it might reasonably expect, with enormous hubris the Family Court has released a single page document, ***What the Family Courts expect from Parents***, which patronisingly expresses how it expects you to behave.

It emphasises your responsibility and duty towards your children and that the best arrangements are those agreed between parents. It warns against denying contact or alienating your child against the other parent. It shows that good post-separation parenting depends on continuing communication. It warns that Court Orders must be complied with. Possibly worth a read.

9.1.6. Failure to attend

If the respondent does not attend an arranged hearing and has had reasonable notice the Court may decide to continue anyway (**Family Procedure Rule 12.14(6)**) or it can issue a Notice of Proceedings to summon you all together within 48 hours, but the likelihood is that they will adjourn. You must obviously object to this as any delay is not in the children's interest. If your children's other parent refuses to attend you will need to ask the Court to issue a Witness Summons; this can be used to 'require a witness to attend court to give evidence, to produce documents to the court, or both'. The summons is made using **Form N20** and guidance is available in **Leaflet EX342**; the form must be filed at least 7 days before the hearing and served on the witness

at least 4 days before. You will have to pay a **fee**. Two copies of the summons should be filed with the Court.

You could also ask the Court to order costs against the other party for a wasted hearing; if they are receiving legal aid contact the LSC and inform them that they are deliberately wasting public money. Don't go too far, though, or you will be seen as vindictive.

If you are considering not turning up to Court yourself, forget it; the head-in-the-sand approach isn't an option and there is no excuse for not attending when the futures and protection of your children are at stake. If it is your application it may be thrown out. Some organisations advising mothers are recommending that mothers don't attend; it is your choice, but if you do not attend a hearing you have been informed of, the Court will assume you have little respect for their authority, assume that you have little concern for your child's welfare, and make an order accordingly.

If you don't turn up and your ex does it is likely the Court will make a decision in your absence which you won't like (**Family Procedure Rule 12.14(7)**); don't imagine that you can then attend Court when it suits you and have it overturned. You can apply to have the order set aside (Family Procedure **Rule 27.5**) but not if the order was made in the Family Proceedings Court. If you truly cannot get to Court – and being unable to find a baby sitter isn't good enough – you must inform the Court and the other party well in advance or as soon as possible afterwards. If the hearing took place without you there you must find out what the outcome was as soon as you can so that if necessary you can appeal it.

In the case of **Re P (A child) [2006] EWCA Civ 1792**, [2007] 1 FLR 1820 a resident mother refused to produce the child on 4 consecutive occasions; this breached a penal notice appended to the Contact Order. The father applied for a committal order; the mother failed to attend court and applied for an adjournment, citing childcare difficulties. The judge refused the adjournment and made a suspended committal order in her absence; further breach of the Contact Order would result in imprisonment. The mother appealed but the Court of Appeal upheld the committal order: what was important was to ensure compliance with the Contact Order; the mother's reason for not attending was merely an excuse.

9.2. The justice process

The procedure the courts must follow in family cases is now governed by the new Revised Private Law Programme; the outgoing President of the Family Division, Sir Mark Potter, released a new **Practice Direction** which is effective from 1st April 2010. This built on the claimed success of the Private Law Programme which aimed to resolve the majority of cases by consent at the First Hearing Dispute Resolution Appointment (FHDRA), and incorporated the new measures to enable contact introduced by the Children and Adoption Act 2006 which came into force on the 8th December 2008.

The Revised Programme also reflects the obsession with the risk of harm an applicant parent is believed to represent to his child.

9.2.1. Mediation

A new Pre-Application Protocol for Mediation Information and Assessment introduced by the Coalition Government in April 2011 obliges couples to consider mediation as their first step unless there are excepting circumstances such as bankruptcy or allegations of domestic violence. This simply extends the existing requirement for legal aid claimants to try mediation to all couples wishing to litigate, and is governed by **Part 3** of the Family Procedure Rules 2010 and a **Practice Direction**.

A would-be applicant in 'relevant family proceedings', before making his application, must contact an accredited mediator and provide contact details of the respondent. The mediator will then contact them to arrange for the couple to attend a single compulsory Mediation Information and Assessment Meeting to determine suitability. If you are using a solicitor they will contact the mediator on your behalf. The mediator can also suggest other methods of alternative dispute resolution such as collaborative law. Ideally you will attend together, but if necessary the mediator will arrange separate sessions.

Relevant family proceedings include private law proceedings involving children and proceedings for financial remedies. They exclude emergency proceedings, enforcement proceedings (where obviously there will already have been court proceedings) and proceedings for financial compensation. Mediation can help with other matters as well as children, including financial remedy, financial and property arrangements.

The Court may adjourn proceedings at any point (under Rule 3.3) to give you an opportunity to obtain information about alternative dispute resolution or to allow it to take place. The Court can make this direction on its own initiative or on application, and will tell you how and by when you must tell the Court whether alternative dispute resolution has been effective. Don't turn up to Court without having considered mediation; you may be sent away again.

To find a suitable mediator you can try:

- Your local Family Court
- **The Community Legal Service** (CLS) Phone: 0845 345 4 345
- **The Family Mediation Helpline** Phone: 0845 60 26 627
- **UK College of Family Mediators** Phone: 0117 904 7223
- **Family Mediators Association** Phone: 0117 946 7180
- **National Family Mediation** Phone: 0300 4000 636

At present there is not the number of mediators available to provide this service, although some solicitors may re-train in order to retain their jobs.

If the applicant contacts 3 mediators within 15 miles of his home and none is able to provide an assessment session within 15 days, the case will be allowed to progress to Court. By way of example, there are

only 4 accredited mediators within 15 miles of Bristol compared with 146 solicitors.

You also do not need to attend a Mediation Information and Assessment Meeting if any of the following apply:

- The other party refuses to engage with the process;
- The mediator (or another mediator within the last 4 months) determines that the case is not suitable for mediation;
- Either party has made an allegation against the other of domestic violence which has led to a police investigation or civil proceedings (this caveat protects against the making of new allegations to secure legal aid);
- Either party is bankrupt;
- Agreement has already been reached;
- The whereabouts of the other party are unknown;
- Proceedings have already commenced and are on-going;
- The application is to be made without notice;
- There is a risk to the life, liberty or physical safety of either party or delay would risk harm to the child, a miscarriage of justice or 'irretrievable problems';
- Social services are involved as a result of child protection concerns;
- A child would be party to the application.

Legal aid will be available for mediation via the Legal Services Commission which will issue certificates to mediators in the same way they now issue them now to solicitors. If you do not qualify for legal aid you will have to pay the mediator in the region of £140 for the session.

Even if you have to pay for mediation it will be cheaper than asking a solicitor to negotiate a settlement; the average bill in legally aided cases is £535 compared with £2,823 for a litigated solution. Check what it will cost before you start. There are no costs awarded for mediation; you each pay your own contribution.

It is best to see the mediator independently to get an idea of what is expected of you, and what is achievable. Mediators are rarely entirely impartial, so play things by ear. If you progress to mediation you and the other party will be offered a series of meetings – four is typical – with one or two trained mediators. In these meetings you can talk about arrangements for the children and money and see whether you can reach agreement. If you can, a written report will be produced detailing any agreement made, and you will both be able to check it with your solicitor if you have one. This document is not legally binding. Mediation is confidential, but if allegations of abuse or violence are made the mediator must contact the police or social services.

Typically you will have between 2 and 4 sessions of about an hour-and-a-half each. If mediation leads to an agreement the mediator will provide a written record called the 'Heads of Agreement'. This agreement can be incorporated into a Court Order if the Court thinks it necessary.

Mediation can allow you and your spouse to retain a better relationship, which can be helpful for the future; but there can be disadvantages with mediation: mediators are focussed on results and have their own interests to serve which will conflict with yours, so they may work towards a short-term solution with which one or both of you may not be happy and which will not last. This means mediators can try to bully you into an agreement which is not in the best interests of your child; stand your ground. Anything discussed in mediation is not meant to be disclosed in Court, so you or your ex can be honest in mediation, but lie through your teeth in Court. Mediation relieves pressure on the overburdened courts by providing an alternative to litigation and it will ease pressure on funding; mediated cases have increased from 400 in 1997 to 14,600 in 2010. This may benefit the courts and the taxpayer, but doesn't necessarily benefit you or your child.

Mediation is frequently a tactical measure. It may be you are well aware mediation with your particular ex has no chance of working; accepting mediation is simply a gesture: a declaration that you are prepared to work for a compromise for the sake of your child. You are advised not to divulge things in mediation which you may need to use later in Court if mediation fails, such as evidence or your plan of attack. As always concentrate on the needs of your child, not on your own needs; emphasise your child's need for a strong relationship with you, but keep your cards close to your chest and do not give too much away at first.

Let's remember Stephen Baskerville's dictum again, 'no rational party concedes anything in mediation that they know they will win in court'. A mother – and I'm sorry but this doesn't often apply to fathers – can go to Court and win the house, the contents of the joint bank account and the children; most won't want to do that to you, but if they do want to, they can. Sooner or later mediation is likely to break down.

You need to plan carefully what you will do next if your child's other parent refuses mediation, they are probably about to file for sole residence, so you need to start thinking about a parenting plan. Refusing mediation is also a delaying tactic, perhaps while a Section 7 report is being prepared by CAFCASS, which can take months. A resident parent can refuse mediation merely on the basis that she has unspecified 'concerns'. Allegations of domestic violence or child abuse will entitle her to legal aid. She will then go off with her legal team and prepare a series of allegations to be made when the non-resident parent is next in Court. He in the meantime is left with nothing: no mediation, no contact, and a long wait during which a new *status quo* without contact is established.

The standard response to a refusal to mediate is to appeal the legal aid (if it is being paid) through the Legal Services Commission (LSC). Write to them explaining the situation and requesting that they withdraw the legal aid certificate. They should not grant legal aid until mediation has been attempted. The one situation in which you cannot do this is if there is a **Non-Molestation Order** or **Occupation Order** against you; in that case the LSC will presume that you are

guilty of domestic violence and will use mediation only to further harass the other parent; which means that the required mediation is not necessary before the granting of legal aid.

If there are further proceedings you will have to produce to the Court a completed **Family Mediation Information and Assessment Form** (Form FM1) confirming your attendance at a Mediation Information and Assessment Meeting or giving the reasons for not attending. If the other party would not engage with mediation or your case is not suitable for mediation the mediator must complete the form stating this and sign it. Otherwise you or your solicitor must complete it

Mediation works best if you are both honest, something you really cannot afford to be in this twisted system. If your ex refuses mediation it will count against them later in Court and make you look good, even if you knew it was a pointless exercise. Thus the system forces you to score points off the other parent and turns you into a hypocrite.

We nevertheless advise cooperation with the process. Mediation itself cannot be compulsory without new primary legislation, so while we wait for that if couples refuse mediation or if the mediator thinks they are unsuitable they will count as having 'considered' mediation and then be enabled to go on to Court. If at all possible, avoid going to Court; almost invariably going to Court will make matters worse, so only take that step if you think you are going to lose contact.

The new Protocol is a crude and simplistic measure condemned by critics as an attempt to mask massive cuts to the legal aid budget by presenting mediation as a panacea. It looks at mediation in isolation rather than in association with other techniques such as Parenting Information Programmes and collaborative law. Good lawyers could already recommend clients to use mediation and judges already had the power to direct litigants to attend mediation information sessions. It may well be that cases suitable for mediation were already being mediated. Mediation is only part of the solution for keeping cases out of the courts; it will not work where one party is obstructive, or where information is withheld, or where there is a power imbalance. Many cases will simply be prolonged.

9.2.2. Schedule 2 letters

Rather than produce the full Section 7 welfare report, which is enormously time consuming and can introduce delay of a year or more, CAFCASS is now producing what are termed Schedule 2 letters. This initiative is introduced in the President's **Practice Direction** on the Revised Private Law Programme, Schedule 2 of which provides a template for the letters – hence the name.

As we have already seen, under the Revised Programme the Courts Service is expected to list your first hearing within 4 weeks of receipt of your completed application. Details of your application on Forms C100 and C1A (or C100A) must be passed by you or your solicitor to the respondent and by the Court within 24 hours to CAFCASS. The respondent must file her response no later than 14 days before the hearing; copies of her forms C7 and C1A will also be sent to CAFCASS.

CAFCASS will then identify any issues raised in the C1As relating to 'safety'. To achieve this a CAFCASS officer known as a Family Court Advisor (FCA) must,

- Carry out inquiries including interviews with the parties by telephone and checks with the local authority and the police;
- Meet with the parties individually if safety issues are raised in order to clarify them;
- Record and outline safety issues for the Court within 6 weeks, using the Schedule 2 template;
- Report to the Court on the outcome of this risk identification no less than 3 days before the hearing, using the Schedule 2 Form;
- **Not** contact the child.

The limitations on the information the police will disclose to CAFCASS are set by a joint agreement with the Association of Chief Police Officers (ACPO) and were clarified in **G v B [2010] EWHC 2630 (Fam)**.

- CAFCASS may not seek information on third parties such as new partners without the express permission of the Court.
- CAFCASS may discuss the information received with the relevant party and with the other parent, but only if there are child welfare issues. They may only include in the report police information which is relevant to the child's welfare.
- They may not give copies of police documentation to the parties or their legal representatives, or attach copies to the report.
- CAFCASS may pass on police information to social services but only where there are urgent child protection issues or for the preparation of a Section 7 report.

If CAFCASS receive nothing from the police or the local authority they will report that the parties are not known to them and that there is therefore no further need for their involvement. The intention is that this should end the use of s.7 reports where they are not needed; many courts are over-using CAFCASS and this is contributing to the backlog, there is wide variation between courts, with CAFCASS used in anywhere between 5% and 90% of cases. The view of CAFCASS is that if the courts want an appropriate service they need to use CAFCASS properly and only where their intervention is essential.

The Schedule 2 letters must deal *only* with matters of safety, and the CAFCASS Family Court Advisor must not discuss any other matters with the parties; it is important that these matters are left until the Court hearing, so that both parties can know what issues the other has raised and so be on an 'equal footing'. Note that CAFCASS effectively have only 17 working days or so to produce this report. Note also that this procedure makes a presumption that there *will* be 'safety' concerns; i.e. that you are a menace to your child.

Under Paragraph 3.9 of **Practice Direction 12B** the Court must inform the parties of the contents of this report unless it would create a risk of harm to a party or to the child (you are a menace not only to your

child but also to your ex). The Court must also consider whether there is need of,

- **A risk assessment**; or
- **A finding of fact hearing** to determine the actuality of any allegations made.

Inevitably – this is CAFCASS we're talking about – reality lags behind the ideal and Schedule 2 letters are only just beginning to be produced to the courts by the due date, so the effect of this scheme isn't yet apparent. Unallocated cases have been reduced, but largely through the strategy of allocating more cases to each worker, and especially to managers; this doesn't actually guarantee the cases will be dealt with and means that these cases are not always subject to regular review and monitoring.

9.2.3. Arriving at court

Each appearance you make in Court is known as a '**hearing**'. Unlike other areas of law there will usually be a number of hearings in each case and there are different types. Some cases can be over and done with in a few hearings, but others can run to many – a hundred or more – depending on how obstructive and litigious your ex decides to be. At the end of the first hearing the Court will set a date for the next. This is supposed to prevent the delay which so often blights proceedings, but unfortunately the process rarely runs smoothly and there will be cancelled, delayed and additional hearings, and many cases can involve several 'final' hearings.

You should be given a date for your first hearing within six weeks or so of your application. This first hearing is known as the '**First Hearing Dispute Resolution Appointment**' (FHDRA) or the 'Directions Hearing' or sometimes the 'Conciliation Hearing' and will be held before a District Judge.

When you first arrive at Court you will pass through a metal detector and be searched by security. Make sure you don't have any 'weapons' (such as pen-knives or multi-tools) on you or a camera (other than your phone).

Report to the usher who will usually be at a reception desk and sign in. Tell them who you are, whether you are the applicant or respondent and whether you will be having a solicitor or McKenzie Friend with you. Find out which courtroom your case is being held in; there will be a list up with all of that day's hearings. You need to know your case number because the parties' names may not be on the list. If you need the lavatory go when you arrive – you may have a very long wait for your hearing.

There is no harm in talking to the other side's representatives, they should treat you with respect. They may well come over to speak to you. If you can come to an agreement outside the Court (even if it is only on the points at issue) it will provide you with something to present to the judge and will make the decision-making process faster and easier. You can usually find a room somewhere to conduct these discussions, or you may have to settle for a seat, even the cafeteria. Don't go too far away or you won't hear when you are called to the courtroom.

9.2.4. The courtroom

The hearing itself will take place either in a more-or-less conventional courtroom or, especially for early hearings, in the judge's office, known as his 'chambers'. Hence these hearings are referred to as 'in chambers', the Latin for which is '*in camera*.'

Typically there will be two tables arranged in a T shape; the judge will sit at the top of the T and the parties and their representatives will sit on opposite sides of the second table, with whoever is to speak nearest the judge. The CAFCASS FCA will sit at the foot. In a Magistrates' Court the arrangement will be similar, but with the three magistrates sitting in a row together, and with their Legal Advisor sitting at a desk to one side. One of the court staff may be present as well, to help the judge if necessary and will otherwise do administrative work on their computer. Everyone should be introduced before the hearing commences. If you are not sure where to sit or who someone is, just ask.

9.2.5. The FHDRA

The First Hearing Dispute Resolution Appointment (FHDRA) must take place within 4 weeks – and certainly no later than 6 weeks – after your application. The majority of cases are resolved through a consent order at the FHDRA; this is the forum at which the Court will assist the parties to reach sustainable agreements, the judge will explore options for resolving your dispute without further court intervention. The Revised Programme intends that this hearing will provide the parties with a forum in which they can be helped towards 'agreement as to, and understanding of, the issues that divide them. It recognises that having reached agreement parties may need assistance in putting it into effect in a co-operative way'. The Revised Programme emphasises that agreements must,

- Be in the best interests of the child;
- Take the child's views into account;
- Be sustainable; and
- Be safe.

The first two considerations merely confirm existing legislation; the second introduces for the first time an acknowledgement that Court Orders are not always practicable or likely to last. The emphasis on safety shows the influence on this Programme of lobbying by women's groups who consider court-ordered contact to be unsafe. Concerns over safety arise only where allegations have been made, and it is our view that allegations of a serious nature must be examined to a criminal standard of evidence, and dismissed as false where that evidence is not forthcoming.

If no 'safety' issues have been identified there should be no need for CAFCASS to attend the hearing, but it appears to be the ruling under the Revised Programme that CAFCASS must attend anyway, together with a mediator if available. The CAFCASS Advisor should meet with both parties outside the courtroom prior to the hearing. You are advised to read the CAFCASS publication ***Putting your children first:***

a guide for separating parents in advance. Arrangements for a mediator will be made locally by CAFCASS. If necessary you and the respondent will be asked to give your consent for the mediator to be allowed to see relevant papers. No pressure should be brought to bear on you to agree to this.

At the hearing the Court should have before it your application on Form C100, your Form C1A (if one has been completed), the other party's Acknowledgement of Service on Form C7, the other party's Form C1A (if one has been completed), the Notice of Proceedings on Form C6 and the Schedule 2 safeguarding letter from CAFCASS.

The Court will inform you of the Schedule 2 letter and its contents unless it thinks that to do so would expose the child or other party to harm. It will also tell you if it considers a risk assessment or finding of fact hearing to be necessary.

At the FHDRA the Court must consider,

1. How many of the issues between you your ex and yourself can resolve through the assistance of the FCA or a mediator;

2. The identification and assessment of risk – this must comply with the **Practice Direction on risk** covered in the next chapter.

3. Further resolution which may be necessary;

4. The avoidance of delay through timetabling and identifying contentious issues early;

5. Scrutiny by the judge of whether consent orders are appropriate;

6. Consideration by the judge of how to involve your child in proceedings – the Court may consider it appropriate to appoint a Children's Guardian for your child, depending on availability and the likelihood of delay;

7. Judicial continuity.

It is vital that the Court manages the case effectively to ensure that the issues in dispute are identified and that only they should then inform proceedings. The Court must move swiftly to the directions it must make before further resolution can be achieved and make interim orders where it can while awaiting the reports it has directed. The case should be transferred to the Family Proceedings Court and the final hearing must be listed as soon as practicable.

Once the issues and the CAFCASS report have been stated you will be encouraged, with the support of the CAFCASS officer, mediator and the judge, to explore the possibility of reaching agreement on some or all of the matters in dispute. Court time is expensive and should be kept to a minimum. If all or any issues can be resolved through mutual agreement, or perhaps through mediation, the judge can make what is called a '**consent order**', that is, one to which both parties consent.

These will often be drafted by the lawyer representing one or other side, or the judge will do it himself; you must check very carefully any order drafted by a solicitor before it is given to the judge. It is not unknown for judges to make 'consent' orders even where one party objects to the contents. Much depends on how much common ground

there is, and what the differences are. Be prepared to compromise, but don't accept anything you feel is against your child's interests; above all, don't accept any false allegations: you will not be able to refute them later on.

A consent order cannot be approved unless it is confirmed that safeguarding checks have been completed or that the safeguarding duty of CAFCASS under Section 16A of the Children Act 1989 is not required (this is what is meant by 'appropriate' at point 5 above).[302] If there is still risk assessment work to be undertaken the final order can be deferred for a maximum of 28 days to a fixed date, but CAFCASS must provide written justification for this. If the subsequent report is satisfactory and there is no reason why the order should not be made the parties will not need to attend a further hearing.

If there are remaining issues to be resolved the FCA must advise the Court of what further means of resolution should be employed and the Court will make directions accordingly; if either of you is receiving public funding mediation is mandatory if funding is to continue, though if the unfunded party refuses there is nothing the funded party can do. If your children's other parent refuses to attend mediation the certificate (for public funding) can be withdrawn, so it is unlikely they won't attend if they are in receipt of public funding. The Court can also consider the use of collaborative law or a parenting plan, or send parents to a Parenting Information Programme.

[302] *Agreement between the President of the Family Division, Ministry of Justice, HMCS, Department for Children, Schools and Families and Cafcass*, 30 July 2009, http://www.familylaw.co.uk/images/Teasers/Interim%20Guidance%20for%20England%20-%2030%20July%202009.pdf

In the County Court the Court must have telephone contact to the Family Proceedings Court listing manager available or a list of diary dates for the appropriate Family Proceedings Court so that subsequent hearings can be timetabled.

The Revised Private Law Programme expects that the child's wishes will be taken into account and that the child will be informed of the proceedings and their outcome. The Court must consider how the child's view will be incorporated into proceedings and whether the child should be joined as a party to the application. If the Court is considering whether it should appoint a Children's Guardian it must first discuss this with CAFCASS to determine how long it will take for one to become available and how much this will delay proceedings.

9.2.6. Directions order

The Court's order will set out,

1. The issues upon which the parties are agreed;
2. The issues which remain to be resolved;
3. The steps, or 'directions', which have been planned to resolve the outstanding issues (such as the preparation of reports), this is why these hearings are known as 'Directions Hearings';
4. Any interim arrangements pending such resolution, including arrangements for the involvement of children;

5. The timetable for such steps and, where this involves further hearings, the date of such hearings;

6. A statement as to any outstanding issues relating to risk or safety; in so far as they are resolved the result will be stated and, in so far as not resolved, the steps to be taken to resolve them will be stated. The judge will ask the CAFCASS FCA to meet with each of the parents and the children separately (and sometimes other adults who may be involved) and prepare a report and a recommendation.

7. If it be the case, the fact of the transfer of the case to the Family Proceedings Court with the date and purpose of the next hearing;

8. If it be the case, the fact that the case cannot be transferred to the Family Proceedings Court and the reason for the decision;

9. Whether in the event of an order, by consent or otherwise, or pending such an order, the parties are to be assisted by further intervention by CAFCASS; participation in mediation by an external provider; collaborative law; use of a parenting plan; attendance at Parenting Information Programmes, or other types of parenting intervention, and to detail any contact activity directions or conditions imposed by the Court.

A template order, PLP10, is provided at Schedule 1 of the Revised Programme.

The judge may order a Section 7 welfare report under Section 7 of the Children Act. We have already looked at this form of evidence in Chapter 7. Courts rely heavily on these reports, and many fathers consider them to be prejudiced against them. They are difficult to challenge and the FCA can only be cross-examined if the Court orders it.

Full welfare reports are only ordered in a minority of cases in which there are welfare concerns and other measures such as mediation or parenting classes have been tried, though they are often ordered where there are no such concerns. They can introduce considerable delay: it can take a couple of months to find a Family Court Advisor (FCA) to undertake the report, and another 3 to 9 months for them to complete the report. Delay within CAFCASS has become so bad in some areas that judges are no longer ordering s.7 reports even where there *are* welfare concerns.

The Court must direct in the order that the report be limited to those factual and other issues which are still disputed. The Court can direct CAFCASS to prepare,

- A 'needs, wishes and feelings' report within 6 weeks;
- A single issue report within 6 weeks;
- A report covering more than one issue within 6-12 weeks depending on complexity;
- A risk assessment within 6-8 weeks.

If either party has completed a C1A form alleging domestic violence or abuse the judge can order a '**finding of fact hearing**' to determine the truth or nature of such allegations, though you may need to request this.

The Court can also direct the Local Authority to undertake a Section 47 investigation under Section 47 of the Children Act 1989 where there is reasonable cause to suspect that a child is suffering or is likely to suffer significant harm.

In extreme cases where the Court considers that it may be appropriate to take a child into care it will direct the Local Authority to undertake a Section 37 investigation under Section 37 of the Children Act into the child's circumstances.

A Directions Hearing will typically be very brief – perhaps only 30 minutes will be allocated – on the assumption that agreement won't be reached so soon. You need to be very organised and have a list written out of the directions you want the judge to make. Don't allow time for the judge to start introducing unnecessary directions or delay; keep him focussed. It is also at this hearing that you must ask the judge to make appropriate directions if you wish to call an expert witness (see below). The Court can then consider whether obtaining any expert evidence is necessary.

Delay is one of the most damaging aspects of the family justice process, and the Children Act specifically demands that it be kept to a minimum; accordingly the Court must, under Section 11, establish a timetable for the proceedings and give details of this timetable in the order. Sadly these are rarely respected.

The Court may direct the parties to produce **Position Statements**; you may not do so unless directed. If, for example, you are being denied contact with your child, you Position Statement will explain that, detail the arrangements made for contact, and show how contact has been frustrated. Your children's other parent will also have to write a Position Statement explaining why they are denying contact.

While the Court awaits these reports and the outcome of further hearings it may well make an order for 'interim' contact if it considers that to be in the child's best interests. Interim contact also helps to minimise the effects of delay, and prevents the cessation of contact becoming the *status quo*. If it is appropriate in your case you are **strongly** advised to make an application for **interim contact**; you won't be awarded any if you don't.

You should come out with some contact at that time by consent (i.e. both parties agree) and an appointment to see CAFCASS for a welfare report if it has been ordered. You will also be given a date for your next hearing.

9.2.7. Issues Resolution Hearing

Once all the statements and all the reports from CAFCASS or from expert witnesses are in – which can take many months – the Court will arrange a further directions hearing. There may then be an Issues Resolution Hearing (IRH) at which further attempts will be made to reach agreement. If agreement is reached at any of these stages, the process can stop there.

9.2.8. Full hearing

If no agreement can be reached at any of the previous stages the Court can progress to a 'full' hearing at which all the contentious issues of the case can be discussed and, it is hoped, resolved.

Due to its probable complexity a full hearing is scheduled to last between 1 and 3 or sometimes 4 days. This is why it is important to follow the timetable set by the judge; delay at this stage can mean having to wait for another 4 consecutive days in Court to become available, which could be months away. The judge will consider the Family Court Advisor's report, the parents may call witnesses and examine them, and the judge will then decide on the case. As we saw in Chapter 5 the Court can make a number of orders according to Section 8 of the Children Act 1989 for Residence, Contact, Prohibited Steps or Specific Issues.

Depending on the complexity of your case, the full hearing may be one of several, or it may be your **final hearing**. Very often the Court will refer to full hearings as final hearings; it would be inadvisable, however, to get your hopes up, as some cases can run to numerous 'final' hearings.

The full hearing will probably take place in a conventional court rather than in chambers. It will be more formal and more stressful than hearings which are conducted in chambers. If the other side has been using a solicitor so far, it is likely that they will now be represented by a barrister.

The position statement you prepare for this hearing must be more comprehensive and detailed than previous statements, and will contain all the relevant evidence. Keep it clear and concise, and write it in a logical sequence. At the end put the order(s) you wish the judge to make.

9.2.9. Presenting your case

The hearing will proceed in four stages:

Opening submissions – this is where you (or your legal representative) present your case, again as briefly and succinctly as possible. If it is your application you will go first; remember, this is your application and your case. When the other party presents their case you must listen respectfully. The order in which parties should be allowed to speak is:

1. The applicant;
2. Respondents with Parental Responsibility;
3. Any other respondents;
4. The child's guardian;
5. The child, if they are party to proceedings and there is no guardian.

If your ex is represented and you are not, your ex's legal representative may be asked to speak first.

Presentation of the evidence in chief – (not at every hearing) here both sides present the evidence you wish the judge to rely on. The order in which parties should be allowed to speak is:

1. CAFCASS or the child's guardian;
2. Expert witnesses;
3. The applicant and their witnesses;
4. The respondents with Parental Responsibility and their witnesses;
5. Any other respondents;
6. The child, if they are party to proceedings and there is no guardian.

Cross-examination – both you and the other party can cross-examine the CAFCASS officer who produced any reports used by the Court and any expert witnesses. You will also have the opportunity to cross-examine your former partner. You will need to have asked leave of the Court to do so in the directions hearing prior to the full hearing. We shall look at this in more detail below.

Closing submissions – the respondent will speak first and then the applicant. Again this is a speech you need to have prepared in advance. You must summarise the main points you have made, explain why the Court should make the order you want, and outline your proposal for your share of the parenting. Explain why it is so important your child has you in their life.

- Carefully organise everything beforehand. This is your **Skeleton Argument**, and we covered how you should prepare it above.
- Prepare only an outline of what you wish to say, do not read a speech: it will sound stilted and awkward.
- List your key points and then expand on them; don't blather or go on for too long.
- Rehearse your statement in front of a mirror; better still, rehearse it before a friend or your McKenzie who will be able to give you advice and criticism.
- Whatever you do, don't attack your children's other parent (verbally or physically!); don't get angry, remain calm and rational.
- Speak to the Court slowly and confidently; stand up straight and grip the desk in front of you, don't twiddle your fingers or play with anything, and don't point at your children's other parent or behave in any way which could be construed as intimidating.

After the closing submissions the judge will deliver the judgement, either *extempore* on the day after a brief break or 'handed down' on a later day. If either party wishes to appeal they do so after the judgement is given.

9.2.10. Responding

If you are the respondent in a case it is essential that you respond! Some parenting groups recommend that you ignore an application made by your child's other parent and don't attend Court.

This is terribly bad advice. You might think that you are entitled to play the gate-keeper role, but the message this will send to the Court is that you have no respect for the Court's authority and don't care about your child's welfare. The Court may well make an order in your absence which you will be unwilling to comply with. Further applications will then be made and the court process will escalate. Far better to attend and perhaps be able to resolve your differences at an early stage.

When the applicant makes their application they will serve the papers on you (see **Serving the Application**); this can be done by the applicant in person, by a 'process server' or by 1st class or registered post. If the applicant serves them personally just accept them and close the door; do not get into any argument. If you already have a solicitor the papers should be served to them. The papers will include:

- A copy of the Notice of Proceedings, Form C6, which will give details of the nature of the application and the child(ren) concerned, the Court, and the time and date of the hearing. Take the form with you to the Court when you attend.
- A copy of the application form(s), C100 and C1A where relevant.
- Copies of any other papers the court office has allowed the applicant to file.
- A blank Statement of Means if the applicant has asked the Court to order you to make a payment for the child.
- An Acknowledgement, Form C7.

You must complete Form C7, entering your name, date of birth and address and your solicitor's detail if you have one.

There are four options for you in response:

1. You may decide that you do not want to oppose the application. It may be for Parental Responsibility, for example, or a Contact Order which will enable you both to put things on a clearer, firmer basis. In this case answer 'No' to Question 5.

2. You may have received a copy of Form C1A in which the applicant expresses concerns over the child's welfare. If you want to comment on these statements you must answer 'Yes' to the second part of Question 6.

3. If you honestly think that the applicant presents a threat to the child's welfare you must answer 'Yes' to Question 7. You may also want to complete your own C1A. Bear in mind that allegations and counter allegations of abuse will get messy, and result in proceedings which can continue for many years.

4. You can also make your own counter application for a Section 8 order; if the application is for contact, for example, you may counter with an application for residence. Answer 'Yes' to Question 8.

Sign and date the form. You must get your response to the Court not later than 14 days before the hearing.

Much that you will have to do as a respondent is the same as you would do as an applicant, and we would advise that you read at least Chapters 4 through 8 of this guide.

In particular you may need to prepare a position statement, which is described at **Section 7.2.1**.

9.2.11. Examining witnesses

When examining your witness make certain that you prepare an outline first. Begin with some background: who the witness is, their relationship to you. Then move on to the evidence: where they were, what they saw. Next, if relevant, introduce any exhibits: photographs indicating abuse, for example. Finally question the witness; try to phrase your questions so that they encourage the witness to elaborate on their story, do not ask questions which simply produce a yes or no answer. Make sure that you prepare these questions and discuss them with your McKenzie before you go to court.

9.2.12. Cross examination

If you have been accused of violence or abuse, Article 6 of the European Convention on Human Rights says, 'Everyone charged with a criminal offence has the following minimum rights: (d) to examine or have examined witnesses against him'. Under the Human Rights Act 1998 Section 6 (1) it is unlawful for the Court to deny you these rights, but the judge may nevertheless refuse you, satisfied that you are unlikely to go to the trouble and expense of taking your case to the **European Court of Human Rights**.

Once you have carried out your direct examination of your witness the respondent, or the counsel acting for them, will be able to cross-examine him or her. It is important to remember that the direct examination controls the cross-examination. In cross-examination the respondent cannot raise issues with the witness which were not covered by the direct examination. Should they try to, you must object.

When you cross-examine the respondent's witnesses you must remember this rule. While they give their evidence under direct examination make sure that you take notes, and jot down anything you want to question them about in your cross-examination.

The purposes of cross-examination are:

- To put your case;
- To attack the other side's case;

- To establish your case – this means winning.

Putting your case means making your submissions. The evidence and statements have already been presented; you should therefore know what you want to say before you begin. Keep the cross-examination short and focussed. The judge isn't going to be impressed by a performance; you should be aiming to undermine his confidence in the other side's case, and thus in the evidence presented by the witness. Stay calm and polite, if you ask the right questions there will be no need to be rude or aggressive.

Only ask one question at a time, and make sure it is one the witness can answer. Refer back to your Case Theory: is the question relevant? Keep your questions 'closed' so that they restrict the answer and not 'open' so they enable the witness to tell their own story. Break sequences down into small points, each of which you establish separately. If you need to build a series of points, get the answer to each before moving to the next. If a witness can be led to agree with a sequence of points, you may corner him into agreeing to the final, decisive one.

To undermine the other side's case you must first understand it. This is vital. That may sound obvious, but it is quite possible to think that, for example, the allegations of abuse against you are merely malicious, when in fact someone else, unknown to you, is really abusing your child.

Also assume that so far the judge is equally disposed towards both of you. You must do two things: present your case and your evidence clearly and forcefully, and expose the weaknesses and inconsistencies in the other party's case, using documentary evidence where possible, but without being discourteous; as Sir John Mortimer, QC said, 'the art of cross-examination is not the art of examining crossly'. If you must expose a direct lie, do so simply and compellingly and without decoration or unpleasantness. Keep your focus on the judge and see how he reacts to the points you make; adapt your presentation to keep him on side, have you established your case and persuaded him?

Once the direct and cross-examination have taken place the judge will probably excuse the witness from giving any further testimony, so make sure you cover all the ground you need to. The Court will assume that you accept anything the witness has said or written unless you challenge it. You can't submit anything later that you haven't raised in cross-examination; plan carefully in advance and write your questions down, with alternative routes to follow depending on the answers.

You are strongly advised not to examine your children's other parent yourself. If there is any animosity in your case (and there will be or you wouldn't be in Court), examining your children's other parent is one of the most difficult challenges for a Litigant-in-Person to do. If you are a father this is the person who has taken your home, and taken your children, who is poisoning their minds against you, making false allegations against you, and trying to prevent contact between you. If you are a mother this is the man who has abused your children or is intimidating and attempting to control you. Do you really think you can question them coolly and rationally?

A much better option is to get your McKenzie to examine your children's other parent for you, and any other witnesses you may find it emotionally difficult to address. This is one of the most useful services a McKenzie can perform. You will need the leave of the Court

for this, but there are precedents, and a sensible judge would much rather a calm and rational examination than have the two of you shouting at each other in his court (see the **Section on the 'Right of Audience'**). One such precedent was set in the Court of Appeal in March 2008 when the MP John Hemming acted as the McKenzie Friend for a mother, RP, whose learning disability made it difficult for her to speak on her own behalf.

If you are obliged to examine your children's other parent you must put all animosity out of your mind and focus entirely on the interests of your children.

9.2.13. Child witnesses

The traditional position adopted by the courts was that it should only be in exceptional circumstances that a child should be called to give evidence. This presumption was overturned in the Supreme Court case of **Re W (Children) (Abuse: Oral Evidence) [2010] UKSC 12**. The case concerned the care of 5 children; the father was biological father to the four youngest. The eldest, a 14-year-old girl, alleged her step-father had sexually abused her; all children were taken onto care with supervised contact between the four youngest and both parents.

The parents agreed to a finding of fact hearing in which the girl would give evidence by video link. The LA then decided they no longer needed her to give evidence and the judge refused the father's application that she be called. The Court of Appeal rejected the father's appeal and he appealed further to the Supreme Court.

The appeal was allowed and the question was remitted to her Honour Judge Marshall whether and how the daughter should give evidence. The existing presumption against a child giving live evidence could not be reconciled with the balancing between competing but equal Convention rights: the child's Article 8 rights to privacy and the father's Article 6 rights to a fair hearing and the opportunity to cross-examine those giving evidence against him. The Court had to weigh the advantages to the determination of the truth against the potential harm to the child's welfare.

The test was whether justice could be done without requiring the child to give evidence. As a precedent Re W removed the presumption and replaced the threshold test with a balancing one.

9.2.14. Challenging an expert

The Court will normally follow the guidance of an expert witness or CAFCASS officer unless either party can provide a good reason why it should not. If you believe the expert is wrong you must say so or the Court will accept their opinion.

Whether the judge takes an expert's testimony into account is at his discretion. If he doesn't take into account testimony on which you are relying you will need to appeal. In particularly difficult High Court cases the judge may call his own expert witness, to sit in and monitor the actions and behaviour of the parties, and report back. This is pursuant to Section 70(1) of the Supreme Court Act 1981:

> *In any cause or matter before the High Court the Court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, and hear and dispose of the cause or matter wholly or partially with their assistance.*

If you do not agree with the expert's findings you must inform the Court so that if necessary the expert can be summonsed for cross-examination. If the opinion is not challenged the Court will accept it and make a decision accordingly. You must provide the Court with a good reason not to accept the report.

If the Court has directed the attendance of an expert witness the 'nominated professional' – normally the other side's solicitor – must ensure that a date and time are fixed for the expert to give oral evidence and an indication of duration of the attendance; if he is not required to give oral evidence he must be notified as soon as possible. To minimise costs the expert may attend via telephone or video link. Check with the guardian before you go to Court that the expert witness has been called, otherwise there is little point in attending.

The well-known cases involving Angela Cannings, Sally Clark and Trupti Patel show that misdiagnosis of sexual or violent abuse is common, and that it can be dangerous to rely on the evidence of a single expert. Experts cannot be sued if the evidence they present is misleading, but they are open to disciplinary action by their regulatory medical bodies.

Challenging an expert witness's evidence can be difficult: he has been paid for his expertise which is likely to be greater than yours, and if you disagree with his opinion it will always count more with the Court than yours will. When you counter, for example, an adverse psychiatric assessment in Court you can only do so on the grounds that you question the psychiatrist's *methodology*.

To do that you will need to write a document showing where exactly in his evidence the psychiatrist broke the rules he should have been using, you will also have to cross-examine them in Court. To do that you will certainly need qualified assistance beyond the scope of this e-book to provide. You are strongly advised to read in full the **Practice Direction** which we have only summarised here and to read up on the expert's field of expertise, paying careful attention to any controversies, for example, in the areas of PAS or MSbP. You will then have to apply to the Court for leave to present the documents of the case to the professional body which represents the expert witness so that you can bring an official complaint against him. Without the leave of the Court you will be in contempt.

Cross-examination of a CAFCASS officer (FCA) is allowed by the Criminal Justice and Courts Services Act 2000, which provides at Section 16(1) 'an officer of the Service may, subject to rules of court, be cross-examined in any proceedings to the same extent as any witness', the Family Procedure Rules 2010 further provide at 16.33(5), 'a party may question the officer about oral or written advice tendered by that officer to the court'. The judge must be using the officer's report as evidence, but if the report has been rejected, then the judge may not agree to allow the examination as it would no longer be relevant and would waste court time.

Due to the increased workload of CAFCASS and their serious backlog courts are instructed now only to summon FCAs to hearings if it is absolutely necessary; otherwise they will be excused. You will need to

ensure the FCA is available and that their attendance is confirmed at the pre-hearing review; ensure that they are written to giving the date of the hearing as the courts don't always do this. You should also request in advance that copies of the FCA's notes on interviews be made available rather than the summary.

If the judge approves the CAFCASS FCA's attendance he will subpoena her to attend; she will then be in Contempt of Court if she does not turn up, although the judge is unlikely to take any action against her if she doesn't. In that event make a complaint about her and her manager; she has caused additional delay, which is contrary to the welfare of the child.

Prepare your questions very carefully beforehand. Never ask a question to which you do not already know the answer; your questioning must bolster your own argument. The opinion of an expert is admissible as evidence, whether based on fact or not, but it is up to the Court to decide where the truth lies.

- Start the cross-examination with consideration of every point in the welfare checklist; has each factor been given sufficient weight; has any factor been omitted?

- Did they have access to all relevant documents; did they have all the information they needed?

- If they are relying on allegations, have they been proved?

- Did the expert visit both parties at home and witness the child with both? If not, why not? Has the expert favoured either party?

- Has everything been interpreted fairly? Has anything been misunderstood? Did the expert have any preconceptions?

- Challenge the expert on the research they have used on which to base their conclusion – are they up-to-date on what type of contact is beneficial to a child of a given age?

- Has the CAFCASS FCA complied with the service standards and policies? You should familiarise yourself with these.

- Have all the potential ways of resolving the dispute been explored? Are there solutions which the expert has not considered?

Much of a CAFCASS report will be based on opinion rather than evidence and will jump to unsupported conclusions; it is vital that you do not let CAFCASS be the final arbiter and that you challenge an inadequate or inaccurate report. Familiarise yourself with the Ofsted reports and look at the standards CAFCASS are supposed to meet; if your report does not meet these standards – which is probable – do not accept it. The report must be fact-based and not reliant on opinion; if it is not satisfactory you must insist on a finding of fact hearing to establish the truth of allegations, etc. Cite the Ofsted reports to back up your case but make sure you are certain of your argument.

If a litigant rejects the findings of the welfare report the judge usually applies the same principles in G v G (Minors: Custody Appeal) [1985] 1 WLR 647 which are applied to appeals.

CAFCASS and social services often seem to expect unreasonably high standards of parenting when they come to write their reports (despite their own very low standards), we should heed the words of Lord Templeman in Re K D [1988] AC 806,

> *The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered.*

and it is relevant to recall the words of Mr Justice Hedley in Re L (Care: Threshold Criteria) (Family Division 26 October 2006) in which, dismissing the Local Authority's application for a Care Order, and warning of the dangers of social engineering, he said,

> *Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. Children will inevitable have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the State to spare children all the consequences of defective parenting.*

9.3. Appeals

9.3.7. Appealing a decision

Note: that until and unless an alternative order is made, the order being appealed stands, and the parties are expected to obtemper (comply with) the order. If you do not intend to obtemper, you must apply for a stay of order – see below.

Note: that if your child is separately represented by a CAFCASS Children's Guardian and the guardian is not happy with the order made by the Court she also has the right to lodge an appeal against it.

Judgements in the Family Court are made on the balance of probabilities, they may often be empirically wrong as a result, but cannot be appealed merely on that basis; consider Lord Justice Ward's observation in **Re P (Children) [2008] EWCA Civ 1431**,

> *There is no appeal against that finding* [that the mother's version of events was to be accepted] *because* [the judge] *would not permit it, and rightly so, because it seems to me it is an unchallengeable finding made by the judge. He heard both parties, and it is the unfortunate task of a judge who has one witness come in to the witness box and swear that the colour held up in front of him is white, then to hear the other side go into the witness box and the same piece of paper is held up before her and she swears that is black, and the judge has to choose whether it is white or black and sometimes may find it is actually grey. Here he accepted the wife's account, and it is*

> *beyond challenge in the Court of Appeal, for the father simply cannot show that the judge abused the great advantage he had of seeing and hearing the witnesses, judging their evidence, their demeanour and coming to a conclusion as he was duty bound to do. The Court of Appeal will not interfere absent the most compelling case that the judge had somehow egregiously come to the wrong conclusion.*

The appeal court has power to interfere only if there is serious procedural or other irregularity in the proceedings of the lower court, and if this irregularity caused the decision of the lower court to be an unjust decision. The principles used derive from G v G (Minors: Custody Appeal) [1985] 1 WLR 647; the appellant must show that the judge must have:

- misdirected himself in law,
- failed to take account of a relevant factor,
- taken into account an irrelevant factor, or
- made a decision which is 'plainly wrong'.

> *It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.*

The Court must bear in mind that there is often no 'right' answer in family cases, but a judge is nevertheless obliged under Article 6 of the Human Rights Act – the right to a fair trial – to give the reasons for his decision, especially if he rejects expert evidence or a CAFCASS recommendation. If he does not, the appeal may well be successful.

One must also add the cautionary words of Lord Hoffman in Biogen Inc v Medeva Ltd [1997] RPC 1,

> *The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.*

9.3.8. Procedure

The procedure for appeal is described in **Part 30** of the Family Procedure Rules 2010. If you intend to appeal, you should ask for leave at the end of the hearing.

Appeals are always made to a more senior judge in the same court or in a higher court than the one which made the order you are appealing.

At the same time you may want to apply for a stay of order, preventing the order you are appealing from coming into force.

Magistrates' Court - Orders made in the Family Proceedings division of the Magistrates' Court are appealed to a Circuit Judge in the County Court. You do not need leave to appeal.

The Family Proceedings Court cannot grant a stay of order, preventing the terms of the order from being implemented, so you must apply to the High Court for a stay of order. Notice of appeal must be filed in your nearest district registry or in the Principal Registry (in London) within 21 days of the hearing, or within such time as is specified from the lower court.

County Court – Orders made by a District Judge in the County Court are appealed to a Circuit Judge in the same court and you will need leave to appeal from the District Judge. If leave is refused you must make a further application to the Court of Appeal. If the Court of Appeal refuses leave you must request within 7 days that it reconsider at a hearing. Either judge can stay the order pending appeal. Notice of appeal must be filed at the same court as the order was made and served within 21 days, or within such time as is specified from the court.

High Court – Appeals from Circuit Judges or High Court Judges are appealed to the Court of Appeal.

Orders made by District Judges of the High Court or Principal Registry must be appealed to a judge of the High Court.

Appeals to the Court of Appeal are governed by the Civil Proceedings Rules **Part 52** and **Practice Direction 52**. If you are refused Leave of Appeal by the Court of Appeal you cannot appeal that.

If you are appealing an interim care or supervision order you must do so within 7 days.

Permission to appeal will only be granted where the court considers there is a reasonable chance of your appeal succeeding or where there is some other compelling reason to re-hear the case. You must show that the decision of the lower court was wrong or unjust because one of the four grounds for appeal detailed above applies.

Before you start, read **Leaflet EX340** *I want to appeal – what should I do?* If the lower court refuses leave to appeal and you are requesting leave from the higher court, you must do so in the application form or 'Appellant's Notice' (on **Form N161**) in which you also state the grounds of your appeal. When you file your Appellant's Notice you must at the same time also file a paginated and indexed appeal bundle, this is a separate bundle of documents for the Court to

use which includes a record of the reasons given for the decision you want to appeal. The **Leaflet N161A** *Guidance Notes on Completing the Appellant's Notice* explains what you need to do, and can be downloaded from the courts Service website.

Leaflet 201 *Routes of Appeal* will tell you where to file your appellant's notice. The receipt of your documents by the Civil Appeals Office does not necessarily mean that (a) the Court accepts jurisdiction or (b) they are in order. It remains your responsibility, and not that of the Civil Appeals Office, to ensure that you file your appellant's notice at the correct appeal court. You will also find **Leaflet 205** *Sources of Help for Unrepresented Appellants* useful.

You must provide to the Court:

- Two additional copies of the appellant's notice;
- One copy of the appellant's notice for each of the respondents;
- One copy of any skeleton argument for each of the appellant's notices provided;
- A sealed (i.e. bearing the court's seal) copy of the order being appealed;
- Any order giving or refusing permission to appeal, together with a copy of the reasons for that decision;
- Any witness statements or affidavits in support of any application included in the Appellant's Notice;
- A bundle of documents in support as described in **Leaflet 204** *How to Prepare an Appeal Bundle for the Court of Appeal*.

You can take this bundle to the Court or post it to: Civil Appeals Office Registry, Room E307, 3rd Floor East Block, Royal Courts of Justice, Strand, London, WC2A 2LL

You will have to pay the requisite **fee** at the Court, or enclose payment by cheque or postal order if you are posting the bundle. Remember to send it by Recorded Delivery. If you deliver the bundle to the Royal Courts of Justice the fee must be paid in the Fees Room, Room E01, Ground Floor, East Block, Royal Courts of Justice.

You will be given a reference number and a receipt for the documents you have filed. The additional copies of the Appellant's Notice for the respondents will be sealed and returned to you to serve them.

Unless the Court directs otherwise:

- You must serve a sealed copy of your Appellant's Notice on all respondents as soon as possible and no later than 7 days after filing the Appellant's Notice;
- If you have already been given permission to appeal or permission is not required you must also serve a copy of your appeal bundle on all respondents with your Appellant's Notice;
- If your Appellant's Notice includes an application for permission to appeal you should not send copies of your bundle to the respondent;

The Appellant's Notice must be served to:

a) all the respondents;

b) any Children's Guardian, welfare officer, or children and family reporter;

c) a Local Authority which has prepared a report under section 14A(8) or (9) of the 1989 Act;

d) an adoption agency or Local Authority which has prepared a report on the suitability of the applicant to adopt a child;

e) a Local Authority which has prepared a report on the placement of the child for adoption; and

f) where the appeal is from a Magistrates' Court, the Court Officer.

A respondent may file and serve a Respondent's Notice if they want leave to appeal or if they want the appeal court to uphold the order for reasons different from or additional to those given by the lower court. The Respondent's Notice must be filed within 14 days of service, or within such time as is specified from the Court.

The respondent need not take any action when served with your Appellant's Notice until notification is given to him or her that permission to appeal has been given.

The Respondent's Notice must be served as soon as possible and not later than 7 days after filing on the appellant and any other respondents.

A judge will consider your application; you will not necessarily have to attend a hearing, if you do you will usually only be allowed 20 minutes to explain to the Court why you think permission to appeal should be given. You will then be given an order setting out the judge's decision. If there is no hearing and permission to appeal is refused you can request an oral hearing; this request must be made within 7 days.

You should note that a judge may sometimes only give leave to appeal on some issues. You will be told what these are. You cannot raise any issue at the appeal hearing for which leave was expressly refused without the appeal court's permission. If you wish to ask for the court's permission, you must do so as soon as possible after notification of its decision to give only limited permission. You must, at the same time, let the respondent know what you intend to do. Your application will normally be dealt with at the outset of the appeal hearing unless the Court tells you otherwise.

If leave to appeal is granted you will be given a date and time for the appeal hearing. You have 15 days to appeal a decision, however you can apply for a 'retrial' at any stage. You will need to make an *ex parte* application with the judge of the original hearing. Few retrials ever get off the ground and judges are not obliged to grant them as with appeals within time. If the appeal is allowed the Court can return the case to the original court, transfer it to a higher court, or make a fresh order.

If you are not claiming the judge erred on the basis of the evidence available to him, but believe that new evidence has come to light which undermines the earlier decision you should ask for a rehearing rather than lodge an appeal. Such an application should be made on notice within 14 days of the trial. You can also apply to vary an order on the same grounds.

It is worthwhile using the appeals process even if you lose. The case will be moved up a level of the courts, meaning that you should receive more professional and experienced attention, and it will be established that there are serious issues and difficulties in your case.

A second appeal is not usually possible. Permission to make a second appeal must be granted by the Court of Appeal and you may have to pay further substantial fees and costs. Section 55(1) of the Access to Justice Act 1999 allows appeals only where:

a) *the appeal would raise an important point of principle or practice, or*

b) *there is some other compelling reason for the Court of Appeal to hear it.*

9.3.9. Human Rights Act

There is little to be gained from invoking the Human Rights Act 1998; the human rights of opposing parties are seen to be equivalent and thus to cancel each other out and the paramountcy principle always trounces any other, justifying any degree of injustice.

The articles under Schedule 1 of the Human Rights Act most often invoked are Article 6, the right to a fair trial, and Article 8, the right to one's family life. Article 6 reads,

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

In the Family Courts it often seems that we are denied the right to a fair trial, and in particular the injunction provided by s.91(14) appears to interfere with an individual's right to access justice. However, it is deemed to be compliant with Article 6 because it is said only to *control* the right of access to justice and not to *deny* it entirely. Article 6 is also interpreted to mean that a judge must give his reasons for any decision made.

Article 8 reads,

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Family Court judges interpret the concept of family life protected by Article 8 in a very specific way. If you still have or have had a meaningful relationship with your children then you have a 'family life' but if that relationship has been very slight or non-existent – perhaps because your child was born after you separated – then you have no 'family life'. You therefore – in the view of the court – have no right to family life which can be violated.

Article 8 is used to argue for the preservation of the relationship between a parent and a child and to argue for regular contact; in **Re C (Abduction: Residence and Contact) [2005] EWHC 2205** Article 8 was interpreted to mean that there must be a presumption of unsupervised contact unless there are good reasons for supervision. In Payne v Payne [2001] 2 WLR 1826, however, the father sought to use Article 8 to counter the mother's application to remove their daughter to New Zealand. He was unsuccessful because the judge, Lord Justice Thorpe, held that the paramountcy of the welfare principle overruled the Human Rights Act.

If you rely on any right or provision in the 1998 Act you must specify in your written application the right or provision which has been breached and the manner in which it has been breached. You must also specify what relief you seek, and whether you want the Court to declare incompatibility, in which case a Minister will be joined as a party. See **Rule 29.5** of the Family Procedure Rules 2010.

9.3.10. The ECHR

You are not recommended to take your appeal to the European court of Human Rights (ECHR). Apparently successful cases like Hokkanen v Finland are useless in practice because the fathers involved didn't actually get contact with their children restored, they only received monetary compensation for contact denial – peanuts compared with the loss of a child. Remember it takes 4-5 years to get a ruling from the ECHR.

To take a case to the ECHR you must satisfy 3 criteria:

1. You must be the victim of a violation of one or more articles of the European Convention on Human Rights, or demonstrate that you are likely to be a victim because you belong to a vulnerable group such as gay men.

2. You must have exhausted all possible legal remedies in the UK.

3. You must make your application within 6 months of the conclusion of proceedings in the UK or, if there were no proceedings, within 6 months of the alleged violation.

You can make your application using an **ECHR application form** or by writing a letter in which you set out,

- Your name, address and nationality;
- The country against which you are making your application;
- The facts giving rise to your application; and
- The article or articles of the Convention you believe to have been breached.

Send your letter by post to: The Registrar, European court of Human Rights, Council of Europe, 67075 Strasbourg-Cedex, France. Once it has received your letter the ECHR will send you an application form. If you need more space you can attach additional pages. Return the form by the deadline set or within a few weeks to remain within the 6 month rule.

Once the ECHR has acknowledged receipt it can be some months or even years before you will hear anything further. The ECHR may rule your application inadmissible if you have failed to meet one of the three criteria or if the ECHR considers that it is 'manifestly ill-founded', i.e., that it is not arguable; it need not give reasons and there is no right of appeal. Most applications are rejected.

If your application is not ruled inadmissible, it will be allocated to one of the ECHR's four sections. A panel of seven judges will decide whether there has been a breach of the Convention. This panel will always include a judge appointed by the United Kingdom. Very important cases will be dealt with by the ECHR's Grand Chamber by a panel of 17 judges. A case can be transferred to the Grand Chamber at any stage in the proceedings.

If your application is ruled admissible you should put in a claim for compensation or 'just satisfaction' within 2 months; you should include legal expenses incurred.

The UK Government will be informed of your application and will be invited to respond. You will be given an opportunity to react to this and there may be further exchanges of written representations. Most decisions are made on the basis of documentation and do not require hearings; if you are called to a hearing you will usually be required to be represented. Hearings are adversarial and public and are conducted either in English or French. Legal aid is available from the Council of Europe at the time of writing which will also cover your travel costs, though you should check the situation at the time of your application. Alternatively you may negotiate a no-win-no-fee arrangement with your lawyer, though if you win and receive no compensation you will still have to pay your costs. Bear in mind that few applications are successful. You will not have to pay the Government's costs if you lose.

When the ECHR has made its decision you will be notified of the date on which its judgement will be made public and published on the ECHR's website. It may award compensation or consider the acknowledgement that your rights have been breached to be sufficient. Either party can request the case be referred to the Grand Chamber if it is not content with the outcome; there is no further right of appeal.

If you are a parent denied contact and do decide to pursue a case to the ECHR the most relevant case is Sommerfeld v Germany. This case deals with whether refusing him contact constituted interference to a

father's right to respect for his family life, and the Court concluded that it did. Manfred Sommerfeld received compensation of 20,000 euros and costs of 2,500 euros.

The court considered that a child's birth parents constitute his family regardless of their married state; his right to his family life endures beyond the breakdown of his parents' relationship, 'and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention'.

The Court then considered whether interfering in the applicant's Human Rights by denying him access to his child was justified. The court concluded that the intervention in his family life made by the German court had been made in order to protect the child's 'health or morals' and his 'rights and freedoms', and was therefore legitimate. The court must strike a balance between the rights of the child and those of his parents, but there are circumstances where the best interests of the child will override the parent's.

The purpose of the ECHR was not to usurp the role of the domestic court but to review that court's decisions in the light of the Convention. The ECHR considered that the German court should not have been satisfied only with the child's wishes and had failed to involve the applicant in the decision making process by failing to order a psychological report; the German court had thereby violated the applicant's Article 8 rights.

The German Government had argued that the father of a child born out of wedlock was less likely than a divorced father to take responsibility for the child and that it was therefore justifiable to discriminate against such a father. The ECHR disagreed and ruled that Article 14 (which prohibits discrimination) had been breached: placing unmarried fathers in a 'less favourable' position than divorced fathers without an automatic right of access was discriminatory.

> *The crucial point is that the courts did not regard contacts between child and natural father prima facie as in the child's interest, a court decision granting access being the exception to the general statutory rule that the mother determined the child's relations with the father... the Court is not persuaded by the Government's arguments, which are based on general considerations that fathers of children born out of wedlock lack interest in contacts with their children and might leave a non-marital relationship at any time.*

9.4. Cases

Schedule 2 letters

G v B [2010] EWHC 2630 (Fam)

Appeals

G v G (Minors: Custody Appeal) [1985] 1 WLR 647
Biogen Inc v Medeva Ltd [1997] RPC 1
Hokkanen v Finland 23 September 1994, Series A no. 299-A
Payne v Payne [2001] 2 WLR 1826
Re SC (Abduction: Residence and Contact) [2005] EWHC 2205
Konrad v Germany [2006]
Sommerfeld v Germany, appl. No. 31871/96
Re P (Children) [2008] EWCA Civ 1431

Human rights

Thomason v Thomason [1985] FLR 214
Glaser v UK [2000] 3 FCR 193; [2000] 1 FCR 153 ECHR
Yousef v Netherlands [2003] 1 FLR 210
Hoppe v Germany [2003] 1 FCR 176
Hansen v Turkey [2004] 1 FLR 142
Zwadaka v Poland [2005] 2 FLR 897

CHAPTER 10: ALLEGATIONS

Violence by women is less frequent, less likely to result in the same level of injury, and is most commonly interpreted as an active effort by the woman to resist the oppressive coercion of her partner. The context of self-defence or retaliation is different from the context of male violence, which is usually one of punishment or control. Men are more likely to be the first and last to use violence in a dispute.

CAFCASS

10.1. False Allegations

Never, ever, ever be tempted to confess to a false allegation because you think – or are told – that it might make your case go more smoothly. It won't, and you will find getting contact after that far more difficult, if not impossible.

10.1.1. Characteristics & effect

Where allegations are made against you the Court will often act 'on the side of caution' as if the allegations had been proven, and prevent contact until they have been found to be false, thus throwing the case into limbo. There is no presumption of innocence in the Family Courts, and another essential principle of law is turned on its head because guilt, in family law, does not lead to punishment. This can be enormously frustrating and prejudicial to your case, as it can take many months before you get a chance to put your position in Court; even then, it is difficult to prove a negative.

False allegations delay proceedings so that a new *status quo* can be established in which you will not have seen your children for many months. This works very much in the resident parent's interest: delay

is a useful tool. The beauty of false allegations is that they can be introduced at any stage in proceedings to cause further delay when needed. The resident parent suddenly 'remembers' an incident or series of incidents which they had 'forgotten' as a result of the trauma caused, and the process begins again, with another finding of fact hearing. Mud sticks: references to unproven allegations can drag on for years in protracted cases and judges cover their arses; expect supervised contact at best until you can clear your name.

To have allegations made against one which are entirely without foundation is one of the most unpleasant aspects of the Family Courts and one of the most common, featuring in a majority of cases. Allegations of domestic violence, of physical and even sexual abuse can be made against a non-resident parent which profoundly influence the outcome of a case, and yet appropriate opportunities for exploring or countering these allegations are denied.

This results in the familiar scenario in which a good father is removed from his children's lives, yet has no power at all to prevent their abuse by the mother's new lover; hence campaigners' familiar demand that fathers be given the same rights as mothers' boyfriends.

False allegations are not only made by mothers; abusive fathers often alienate their children and then coach them to make false allegations against their mothers. False allegations are so much more believable if they come from a child. Many mothers experience the distressing phenomenon of being falsely accused by their own children;

> [Mothers] *describe the impact of these False Accusation experiences on their psychological or emotional state of mind to be as numbing and devastating as if they had suffered a severe trauma such as having been a casualty of a major road traffic accident.*
>
> *It is entirely possible that some* [mothers]*, after a lengthy and sustained campaign against them by their child and several members of their family and friends, suffer symptoms akin to post traumatic stress disorder.*[303]

Social services are also inclined to make false allegations, and suffer from a collective 'witch hunt' mentality which sees signs of abuse in the most innocent of circumstances. These allegations can then be made in secret hearings without any external or independent scrutiny and can result in a child's permanent removal from his parents.

Concurrently, when there has been real abuse the courts fail to prevent it, and often fail to investigate. For non-resident parents one of the greatest concerns is that the courts don't investigate a resident parent when allegations against the other have been proven false; often these parents are themselves abusing their children, or their new partners are – the biological father of Baby P was excluded on the basis of false allegations. Some have even been known to injure their children in order to persuade a medical examiner that the child has been abused. From resident parents the corresponding accusation is that the courts do not adequately protect from their non-resident parents those children who are at genuine risk.

[303] *Mothers apart from their Children* (MATCH) http://www.matchmothers.org/pages/reasons.html

When parents are in new relationships false allegations can have terrible repercussions: new partners are warned to keep their children segregated, and babies born into the relationships are taken into care.

False allegations are not unique to contact and residence disputes; teachers, for example, are all too familiar with the problem, and each year some 4,000 allegations are made against them. In May 2009 a ministerial working group found that only 1.2% results in convictions, and 1% in cautions.[304] Nevertheless, 21% lead to disciplinary proceedings and 5% to dismissal, showing that they are an effective way for a pupil with a grudge to end the career of a teacher.

The lobby group Women's Aid claim that a quarter of women are the victims of domestic violence (though more objective analyses quote a much lower figure), and yet Her Majesty's Court Service states that allegations of domestic violence are made in 85% of contact disputes. Are we really to believe that the courts are full of the 1 in 4, or is there some serious bandwaggoning going on?

10.1.2. How the courts respond

In the Family Courts a mother who implacably stops contact between child and father is treated as someone who is upset and needs time to 'cool off,' rather than as someone who is failing to put the needs of her child first. Conduct which in any other circumstances would be considered a serious crime is routinely dismissed as being understandable at an emotionally-charged time: a response to the 'distress' of the proceedings. Yes, perjury is a criminal offence, but no, a mother will not be held in contempt for lying to the Court. What appears to you to be perjury will always be excused as a party being mistaken or misremembering an incident.

Judges are extraordinarily lenient when false allegations are made by a mother, and excuses will be made: she is stressed, anxious, etc; fathers are routinely told to put these trivial irritations behind them.

> *It would be hoped that father might have been able now to put this matter on one side. It seems that he is not yet able to do so… the father would inevitably feel intensely bruised and battered by the allegations of sexual impropriety… despite his understandable sense of outrage at the allegations he had really learnt nothing from the whole process.*[305]

What, we wonder, did Lord Justice Wall expect this unfortunate father to learn?

Judges will dismiss evidence of perjury by refusing to read or consider it. The courts will not contemplate committal because they believe it is not in the best interests of the child. If it were not that false allegations can be made with such impunity it is likely that they would not be made at all.

[304] Laura Clark, *Just 2% of claims against teachers turn out to be true*, Daily Mail, 15 May 2009, http://www.dailymail.co.uk/news/article-1182783/Just-2-claims-teachers-turn-true.html

[305] A v A (Shared Residence) [2004] 1 FLR 1195

10.1.3. How you should respond

Applications for Contact Orders often provoke the making of false allegations; they are a common experience for two simple reasons: they can be made with impunity; and they are extremely effective at limiting or terminating contact. To be accused of physically or sexually abusing your own child is immensely hurtful and traumatic; you will feel ashamed and reluctant to discuss it with anyone else. This is the intention, and it is why solicitors and CAFCASS encourage this vile tactic.

False allegations are closely linked to Parental Alienation Syndrome (PAS) in which one parent attempts to alienate their child against the other through systematic denigration. This leads to the harrowing situation in which the child himself begins to make false allegations against his parent.

You should also be aware of 'Sexual Allegations in Divorce Syndrome' (SAID) which concerns the use of allegations of sexual abuse as a tactic or bargaining chip in divorce or custody disputes.

SAID isn't recognised by the UK courts, but it will help you to counter allegations against yourself if you understand how it works. Greater detail is available on the internet, so we shall look only briefly at how to recognise it and how to respond. False allegations follow a pattern,

- The allegation almost always surfaces only after legal action has begun in child contact proceedings.
- There has been a history of family dysfunction and the conflict which led to separation is unresolved, and usually involves underlying issues both expressed and suppressed.
- The mother is often of the 'histrionic' personality type (see section on **Histrionic Personality Disorder** below).
- The father is often of the 'passive-dependent' personality type (unable to make decisions, dependent on others for care, fears separation).
- The child is typically a female under the age of eight; she may show behavioural patterns of verbal exaggerations, excessive willingness to reproach, inappropriate affective responses, and inconsistencies in relating the alleged incidents (these are all, of course, symptoms of Parental Alienation Syndrome).
- The child's allegation is first communicated via the resident parent.
- The resident parent usually takes the child to an 'expert' for further examination, assessment, or treatment and confirmation of the allegations.
- The 'expert' then communicates to a court or other appropriate authority a concern and/or confirmation of apparent sexual abuse, usually identifying the father as the alleged perpetrator, though it is rare for the 'expert' to meet the father.

- This typically causes the Court to react to the expert's information by acting in a predictably 'responsible' manner, e.g., by suspending or terminating contact, foreclosing on residence agreements, or in some other way limiting the child/parent interaction.

Tragically very few professionals in the divorce industrial complex have been trained to recognise these patterns. Most help and expertise comes from lay campaigning organisations; join one and educate yourself.

If you are falsely accused you must discuss it – do not feel isolated or ashamed, many others share your experience. Treat serious allegations seriously: they work and they will lose you contact. Keep meticulous records in your **Chronology** of all contact and what happened: the onus will be on you to disprove the allegations. When you are with your child get someone, a friend or family member, to video you together and take photographs. Accumulate as much evidence as you can to demonstrate a normal, healthy, happy relationship between yourself and your child. You can then present this evidence to CAFCASS or to the court.

When they escalate false allegations tend to follow the same pattern; the first may well be contained in a solicitor's letter and be relatively mild. At this stage a simple written response stating that you rebut the allegations may be sufficient. Suggest that your child's other parent produce material evidence to substantiate their allegations. If they cannot, confirm that any future correspondence from the solicitors containing such allegations will be addressed to the Legal Ombudsman in the form of a complaint. If your child's other parent is on public funding, advise the solicitor that, in future, you will be sending copies of all correspondence from them to the Ombudsman and the Legal Services Commission as a matter of course (and **DO IT**).

When false allegations suddenly change from the mild to the extremely serious it is likely your ex is being coached, possibly by her solicitor, by CAFCASS, or perhaps by one of the organisations established to support victims of DV but now overrun by feminists such as Refuge and Women's Aid.

If your child's other parent has not yet made false allegations against you but you suspect that they are about to, or if they have threatened to do so, you can forestall this by going to your local police station NOW and asking to see their local domestic violence officer or child protection team. Explain your situation and that you fully expect your ex to make false allegations against you at some stage.

There is little you can do to counter false accusations. Protestations of innocence never sound as convincing as a carefully concocted lie. Remember that your children's other parent may have been planning this for some months before they even mentioned divorce. You MUST press for a '**finding of fact**' hearing; this is really your only legal option to clear your name. Remember that if you don't challenge an allegation when you have the opportunity it will become accepted by the Court and you won't be able to have it removed later. You can also challenge your child's other parent and their legal team to substantiate the allegations by producing evidence, and ask the Court to disregard any allegations unless evidence is forthcoming.

It isn't easy to clear your name from a false allegation. In the case of **Westcott v Westcott [2007] EWHC 2501 (QB)** Richard Westcott wished to sue his daughter-in-law Sarah for slander; she had falsely alleged that he'd assaulted her and her child. He claimed the allegations were malicious (they were made in the context of an acrimonious divorce), and calculated to compromise his position as a Justice of the Peace and occasional chair of the family panel at Worcester Magistrates' court. The judge ruled that the allegations formed part of a witness statement and were thus protected from defamation proceedings by the rule of '**absolute privilege**' (see **Glossary**).

Sometimes it's best just to let the allegations keep on coming: they will eventually be seen for what they are – the ravings of someone who hates you more than they love their child. Don't counter with allegations of your own: you will only end up looking like a pair of squabbling children; you will look much better in Court if you make it quite clear that in the best interests of your child you have no intention to make cross-allegations against your child's other parent – don't stoop to their level. Never make allegations unless you have cast-iron evidence to support them. Rise above it.

A final tip: a false allegation may not necessarily be false. Just consider that while you yourself are innocent the allegation may still be true; your accuser has just identified the wrong perpetrator. Don't get so bogged down declaring your own innocence, as I did, that you miss the fact that someone else is abusing your child.

You can find further help and information from the False Allegation Support Organisation, FASO, www.false-allegations.org.uk, which runs a helpline on 0870 242 66 50. Also have a look at the American organisation Abuse Excuse, www.abuse-excuse.com.

10.1.4. Comment by F4J

Serious allegations are made of a degree which should be dealt with under the criminal law 'beyond reasonable doubt' standard of evidence, but in the Family Courts they are only assessed under the civil law 'balance of probability' standard. There is therefore less reliance on evidence, and greater weight given to unsubstantiated claims. Of course, everyone knows most of the allegations are false, and judges used to be solicitors and used the same tactics. It creates delay (which is beneficial to resident parents) and brings more money (your money) into the system. Please read the analysis of the 'balance of probability' standard in the **Introduction**.

The Children Act 1989 relaxed the rules on evidence by removing the requirement that position statements should be sworn, that is, presented as affidavits, and also allowed the presentation of hearsay evidence. If a party signs a court document which they know to be false they can be prosecuted for Contempt of Court. When children are genuinely considered to be at risk the case should be reported to the child protection authorities and proper process followed – not dealt with in the kangaroo Family Courts merely on the basis of presumed probabilities.

10.2. Finding of Fact

10.2.1. Allegations

When families break down one of the consequences is an escalating hostility which frequently results in the making of false allegations. The legal procedure which gives you your principal opportunity to challenge these allegations is the Finding of Fact Hearing. Although the allegations which give rise to finding of fact hearings are often of a criminal nature, the standard of proof required to establish the veracity of an allegation is not the criminal 'beyond reasonable doubt' standard, but the lesser 'balance of probabilities' standard. We discussed this in greater detail in the Introduction.

One of the reasons fathers are so frustrated with the Family Court is that statistically, like it or not, child abuse (other than sexual abuse) is actually more likely to be perpetrated by mothers. Many fathers find themselves the target of false allegations, and yet the Practice Direction[306] does not consider the possibility that allegations may be false or cover what courts should do in that event.

Of course, that finding of fact hearings exist at all is an acknowledgement that allegations need not always be true, but the courts have yet to show that they can deal appropriately with the outcome when allegations are demonstrated to be false, for example by ordering further investigations of the resident parent or by transferring residence.

Mothers are not well served by this either. Few women share the gender politics which lie behind this nonsense; they just want their children protected from violence and abuse. This ideological flag waving does nothing to achieve that and CAFCASS is notorious for failing to identify real risk when it occurs.

A finding of fact hearing is convened to determine whether or not some alleged violence or abuse (which is presumably denied) did indeed take place. If allegations have been made against you, you will want to refute them and have them dismissed; your only way to do this is through a finding of fact hearing.

Remember that the Court will rule on the balance of probability. This will not be like a criminal hearing where the allegations must be proved beyond reasonable doubt. You may well not be cleared. If, however, the finding of fact must be dealt with before you have any contact with your children, you have nothing to lose.

Once the finding of fact is made it is very difficult to challenge or overturn it.

10.2.2. How the court decides

The fundamental precedent is set by **Re L, V, M & H (Contact: domestic violence) [2000] EWCA Civ 194**, 2 FLR 334/404 in which the Court of Appeal stated that in a contact or other Section 8

[306] Sir Mark Potter, Practice Direction: *Residence and Contact Orders: Domestic Violence and Harm*, 14 January 2009, http://www.judiciary.gov.uk/Resources/JCO/Documents/Practice% 20Directions/pd-domestic-violence.pdf

application where allegations of domestic violence have been made which might have an effect on the outcome, those allegations must be adjudicated upon and found proved or not proved (fact finding hearings are also called 'Re L' hearings). This point is also emphasised in the guidelines for good practice on parental contact in cases where there is domestic violence.

These recommend that the courts should consider what evidence is required and what directions need to be given in order to make findings of fact in relation to disputed allegations of abuse which are likely to affect the outcome of the case. Re L also contains an exhaustive review of the issue of domestic violence and contact and includes a very valuable review of the current state (as at 2000) of psychiatric opinion on this topic.

The Court must first decide whether such a hearing is necessary; it will not be necessary if:

- The fact of the allegations being true or not has no bearing on the order applied for;
- The allegations are admitted;
- The accused already has a criminal conviction for the alleged violence or abuse – such convictions cannot be challenged in the Family Court, even if unjust.

The criteria which should decide whether or not a finding of fact hearing is appropriate were expressed in paragraph 24 of Mr Justice McFarlane's judgement in **A County Council v DP, RS, BS (By the Children's Guardian) [2005] EWHC 1593 (Fam), [2005] 2 FLR 1031**,

- The interests of the child (which are relevant but not paramount);
- The time that the investigation will take;
- The likely cost to public funds;
- The evidential result;
- The necessity or otherwise of the investigation;
- The relevance of the potential result of the investigation to the future care plans for the child;
- The impact of any fact finding process upon the other parties;
- The -prospects of a fair trial on the issue;
- The justice of the case.

10.2.3. Split hearings

Standard practice frequently results in two hearings, one to determine the facts, and one to decide the case based on these facts. This is known as a 'split hearing' and it causes additional delay and expense, both to the parties and to the taxpayer, and uses up valuable court time and resources, often unnecessarily. Clearly there is no

benefit to the Court in conducting a finding of fact if the outcome is to have no bearing on the final decision.

Guidance on split hearings was issued in May 2010[307] by the President, Sir Nicholas Wall, who considered that split hearings were: (1) taking place when they did not need to; and (2) taking up a disproportionate amount of court time and resources.

The President reminded judges and magistrates that a fact finding hearing is a working tool designed to assist them to decide the case. The key factor is to decide whether finding the allegations proved or not proved 'would be relevant in deciding whether to make an order about residence or contact and, if so, in what terms.' Thus a fact finding hearing should only be ordered if the Court takes the view that the case cannot properly be decided without such a hearing. Even if the Court takes such a view, it does not follow that such a hearing needs to be separate from the substantive hearing.

The problem with this approach is that unchallenged allegations become accepted into the record, which may mean the failure to hold a finding of fact hearing can have a devastating effect years down the line.

In nearly every case, the Court's findings of fact inform its conclusions. In Wall's judgement it will be a rare case in which a separate fact finding hearing *is* necessary. The decision to hold a finding of fact hearing is a judicial one, and not one for CAFCASS or the parties to make or influence. This guidance should be seen in the context of the Government's plan to shave £325 million off the Ministry of Justice budget.

10.2.4. Cutting corners

A new Practice Direction on domestic violence and abuse was issued by the President of the Family Division in January 2009.[308] It confirmed that fact finding is part of trying a case and not a separate exercise and required that where domestic violence is raised as an issue, the Court must,

- Identify at the earliest opportunity the factual and welfare issues involved;
- Consider the nature of any allegation or admission of domestic violence and the extent to which any domestic violence which is admitted, or which may be proved, would be relevant in deciding whether to make an order about residence or contact and, if so, in what terms;
- Give directions to enable the relevant factual and welfare issues to be determined expeditiously and fairly;
- Consider whether it is necessary to direct CAFCASS to prepare a s.7 report.

[307] *The President's guidance in relation to split hearings*, May 2010, http://www.familylaw.co.uk/system/uploads/attachments/0000/6106/Practice_Guidance_Split_Hearings_May_2010.pdf

[308] Sir Mark Potter, Practice Direction: *Residence and Contact Orders: Domestic Violence and Harm*, 14 January 2009, http://www.judiciary.gov.uk/Resources/JCO/Documents/Practice% 20Directions/pd-domestic-violence.pdf

This guidance was repeated in the interim guidance issued by the President on clearing the CAFCASS backlog. There is concern that there are still cases where the courts are failing to hold a finding of fact hearing; this is attributed largely to the failures of CAFCASS to manage their workload effectively. Instead of a proper finding of fact hearing we are seeing CAFCASS carrying out what it calls '**risk assessments**' which are driven by false assumptions and an overtly politicised ideology. The Practice Direction should ensure that finding of fact hearings do take place, but whether it has that effect remains to be seen.

The guidance on split hearings obliges parties or their representatives to show both that allegations of domestic violence or abuse are relevant to the Court's decision on residence or contact and also why they are relevant and how they are likely to influence the Court's decision.

10.2.5. Requesting a finding of fact

If you want a finding of fact hearing in your case you will need to make a written application to the Court of the findings you wish to be made. Include the evidence you wish to introduce to support your case and details of any witnesses you wish to call. The worst case is if the judge decides a finding of fact is unnecessary and merely uses his discretion to decide the veracity of the allegations on the balance of probability. In this event you must appeal.

If evidence is available from the police or a hospital this must be obtained and the Court must make an order for disclosure. This can take 28 days. If you are an LIP ask your ex's solicitor to arrange this.

Typically the hearing will take a day, and you will then have to wait weeks for the judge's report. There will then be a further hearing for determination of your application, i.e. whether or not you will be given contact or residence. You must be given the opportunity to challenge the allegations, which means the party who has made the allegations must be made to take the stand so that you can cross examine. If the party is not made to take the stand you must appeal.

10.2.6. Scott Schedules

One common way of presenting false allegations is to prepare what is referred to as a **Scott Schedule**, named after a surveyor who developed the tool for use in litigation. The Schedule is a document set out as a table in which the numbered allegations are listed in one column and the respondent's comments or refutations in another. A typical Scott Schedule might look like this:

WE ARE FAMILY
WE ARE FATHERS4JUSTICE™

IN THE XXXX COUNTY COURT CASE NUMBER

BETWEEN JOHN SMITH

APPLICANT

AND

JANE SMITH

RESPONDENT

APPLICANT'S SCHEDULE OF FINDINGS SOUGHT

No. of Allegation	Date	Applicant's Allegation	Reference	Respondent's Response	Reference	Judge's Finding
1.						
2.						

The allegations and responses are recorded briefly, with references to the fuller account in the witness statement and the relevant page number in the bundle. The judge's findings are recorded in the final column. The respondent can simply state 'Admitted' or 'Denied'. Failure to prepare the schedule when ordered could result in the case being adjourned and possible cost penalties. Because false allegations are likely to escalate a Scott Schedule can be a way of fixing them so that no new ones can be introduced.

The problem with providing responses to each individual allegation, however, is that you effectively dignify and acknowledge them and allow them to become a part of the proceedings. It's fairly probable that the Schedule is nothing more than a smoke-screen and a ruse to add additional delay. Your best strategy may well be to refuse to engage with it at all, especially if the allegations are trivial, and amount to nothing more than the entirely normal behaviour of a loving parent tested beyond endurance.

10.2.7. Determining the truth

It is vital that if you are falsely accused of domestic violence (DV) you educate yourself to understand it properly. The popular 'gendered' understanding of DV is very different from the reality. We shall present a discussion of this claim shortly. This means that a parent who makes false allegations will base them on this false model and not on the reality; the allegations will therefore be quite different in their nature from real ones. Use this fact.

Real domestic violence, like child abuse, is a *pattern* of behaviour which develops over time; no one suddenly wakes up one morning and decides to beat their spouse. Many Family Court cases descend into a 'he said/she said' scenario which fathers usually lose. Spending some time examining the allegations and looking for these patterns is a good way to determine whether the allegations are true or false. If a man

who has never shown any warning signs or DV-associated behaviours is suddenly accused of an isolated incident to which there was no witness, it is likely that the alleged incident never occurred. Genuine cases of domestic violence will demonstrate a pattern and development which an experienced investigator should have no difficulty reading.

John McLaughlin and Karen Borders are former Los Angeles police detectives who employ an investigative approach to 'he said/she said' domestic violence cases. Their Domestic Violence and Child Abuse Risk Assessments are designed to prove or disprove abuse allegations, and to answer the questions judges face. John says,[309]

> *Interviews are conducted of the involved parties. Documents are analyzed for inconsistent statements, witnesses are located and interviewed. We utilize all available resources to look at the context of the allegations, to look at patterns of behaviors, and determine what the truth is. Utilizing two or three different disciplines and perspectives allows us to look at the allegations from different angles so nothing is missed.*

No such process has been adopted in the UK where there is fierce opposition to schemes – such as the PAS theory – which would help courts make these identifications. It is also instructive to quote Mr Justice Munby's warning in **Re D [2004] EWHC 727 (Fam)**:

> *False allegations of misconduct are highly damaging and destructive… The Court should grasp the nettle. Such allegations should be speedily investigated and resolved, not left to fester unresolved and a continuing source of friction and dispute. Court time must be found – and found without delay – for fact finding hearings. Judges must resist the temptation to delay the evil day in the hope that perhaps the problem will go away. Judges must also resist the temptation to put contact 'on hold', or to direct that it is to be supervised, pending investigation of the allegations. And allegations which could have been made at an earlier stage should be viewed with appropriate scepticism.*

In theory it should be very easy in the UK Family Courts to prove your innocence; in practice it is not because the investigator in these cases, CAFCASS, is both under-resourced and firmly wedded to the politicised, feminist model of domestic violence. The limited, partial training they get indoctrinates them into a mind-set in which separating false from genuine allegations is seen as irrelevant, and children suffer as a result, either losing good parents, or being subjected to preventable abuse. Look at the CAFCASS welfare report template; as with other child protection services in the UK, the emphasis is on complying with a dogma of political correctness so extreme that it is wholly incapable of seeing beyond a child's ethnic origin or disability to any signs there may be of abuse or neglect. Treat CAFCASS as you would any social services department and be on your guard.

The standard guidance given to CAFCASS Children and Family Reporters (CFRs) is provided by Lord Justice Thorpe's advice in **Re M (Disclosure: Children and Family Reporter) [2002] EWCA Civ 1199**. The relationship between the judge and the CFR is cooperative but

[309] Glenn Sacks blog, *Ex-Cop John McLaughlin: 'No one wakes up one morning and begins to beat their spouse... When looking for patterns of behavior it becomes clear whether the charge is true'*, http://glennsacks.com/blog/?p=1748

independent; each has a function to perform and a responsibility and each must exercise their judgement and their discretion.

The CFR's response will depend on whether the abuse,

a) Has been observed by her or reported to her directly by the child; or

b) Has been reported to the CFR by someone else.

If the latter the CFR must determine,

a) Has the information already been relayed to social services or the police?

b) Is there a history or pattern of past complaints?

c) How plausible is the report?

d) Was the informant a party to the proceedings?

e) If yes, has he put this statement in evidence?

The CFR must also consider,

a) Whether the abuse, if established, amounts to significant harm or the risk of significant harm within the meaning of s.31.

b) Whether there a need for urgent action. What are the risks of delay?

These are the questions the CFR must ask and the answers will determine the appropriate course of action. Second-hand reports will not need to be relayed to social services (this will already have been done) and are unlikely to be urgent. The judge will be consulted before further action is taken.

Thorpe warns CFRs to 'be alert to the danger of being enmeshed in the strategy of the manipulative litigant'. In other words, both allegations and denials may be false; it is essential that the CFR remains independent and impartial and does not give either litigant cause to believe they have taken sides, compromising the exercise of justice.

Where abuse is discovered by the CFR or reported to her directly she may report it immediately to the social services or police according to her discretion. The judge must be informed as early as possible so that he may consider any implications on the proceedings or the making of further directions.

The truth is that the domestic violence industry has nothing to do with punishing violence and everything to do with wresting custody of their children away from parents, and in particular, from fathers because the industry requires the removal of the father before it can intervene. Any applications made through the courts are presented as 'violent' challenges to control and exert power, when all these men really want is to be able to see their children again. Malicious allegations of violence are prompted by nothing more than the struggles of fathers to be good parents. Few allegations of domestic violence occur outside of the divorce and custody courts, and if a crime hasn't been committed there is little point in prosecuting it: few

fathers will be charged or prosecuted because there is no evidence against them.

10.2.8. The outcome

If you already have a criminal conviction for the violence alleged, it will be taken as evidence and a fact finding hearing will not be necessary. If you were found 'not guilty' the Family Court will take that as merely 'not proven' and still hold the fact finding hearing because the lower standard of proof means the Court may still find that the allegations are justified. Similarly if the police decide to take no further action (NFA) on an allegation, this is not evidence of innocence.

If the allegations are not admitted or proved by finding of fact or a pre-existing criminal conviction the accuser may not continue to rely on them. If the accuser refuses a finding of fact hearing the Court will dismiss the allegations.

If in a finding of fact hearing you are found, for example, to be guilty of domestic violence of which you are, in reality, innocent you MUST appeal. Failure to do so is taken as acceptance of the allegation, and will affect the proceedings from that point. In **Re P (Children) [2008] EWCA Civ 1431** Lord Justice Ward insists,

> *I have to state to* [the father] *as emphatically as I can that he has to accept those findings of fact because they were not appealed by him, and the Court will not go back and re-hear those matters. They have to be accepted.*

Henceforth the father is branded as violent and is treated accordingly, regardless of the fact that the father's failure to appeal was probably the result of procedural ignorance and despite the fact that the 'balance of probabilities' standard must allow a degree of doubt.

If the allegations are found to be unsubstantiated any further allegations will be looked on with scepticism. This is one area in which judicial continuity is vital.

The guidance in the *Family Law Bench Book* is that 'domestic violence is not a bar to contact. It is one factor to be taken into account in the welfare check list exercise'. This might seem reckless if you are a parent trying to prevent your child being abused by the other, but the Family Courts must balance the threats to a child, and loss of contact with a parent can be at least as harmful as other forms of abuse.

If the allegations are substantiated the Court may ask CAFCASS to carry out a risk assessment. If the Court believes the children to be at risk of harm it may ask social services to prepare a **Section 37 report**. You may be sent on an anger management course or supervised contact may be ordered. It all depends on the nature and seriousness of the allegations. CAFCASS will be guided by the welfare checklist and by the Practice Direction on Domestic Violence and Harm.

10.2.9. Risk assessments

The Children and Adoption Act 2006 adds a Section 16A to the Children Act 1989 in order to provide CAFCASS with the additional power to carry out 'risk assessments', this came into effect from October 2007. If a CAFCASS officer suspects a child to be at risk of harm she must carry out an assessment of that harm being suffered by the child and provide it to the Court.

A brief Practice Direction was issued in September 2007 on the use of risk assessments where there was any suspicion of harm; it was reissued as **Practice Direction 12L** in 2010; it reads:

1.1. This Practice Direction applies to any family proceedings in the High Court, a County Court or a Magistrates' Court in which a risk assessment is made under section 16A of the Children Act 1989 ("the 1989 Act"). It has effect from 1st October 2007.

1.2. Section 16A(2) of the 1989 Act provides that, if in carrying out any function to which the section applies (as set out in section 16A(1)), an officer of the Service or a Welsh family proceedings officer is given cause to suspect that the child concerned is at risk of harm, the officer must make a risk assessment in relation to the child and provide the risk assessment to the court.

1.3. The duty to provide the risk assessment to the Court arises irrespective of the outcome of the assessment. Where an officer is given cause to suspect that the child concerned is at risk of harm and makes a risk assessment in accordance with section 16A(2), the officer must provide the assessment to the court, even if he or she reaches the conclusion that there is no risk of harm to the child.

1.4. The fact that a risk assessment has been carried out is a material fact that should be placed before the Court, whatever the outcome of the assessment. In reporting the outcome to the Court, the officer should make clear the factor or factors that triggered the decision to carry out the assessment.

A further Practice Direction on how the courts should deal with allegations of domestic violence was issued by the President of the Family Division in May 2008 and reissued in January 2009 to reflect the House of Lords decision in **Re B [2008] UKHL 35**; [2008] 2 FLR 141 in which Baroness Hale confirmed that a fact-finding hearing is part of the process of trying a case and not a separate exercise and that where the case is then adjourned for further hearing it remains only part heard. The guidance was issued again in 2010 as **Practice Direction 12J**. The essential points are these:

- The definition of domestic violence used is very wide and includes physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may have caused harm to the other party or to the child or which 'may give rise to the risk of harm' (note Hale's further definition of domestic violence in Yemshaw v London Borough of Hounslow [2011]).

- The Court must first decide whether domestic violence is being raised as an issue and must identify the factual and welfare issues as early as possible. The Court must consider what impact the allegations and domestic violence – if proved – will have on the proceedings and on any order the Court is likely to make. As soon as the application is received – on the C100 and C1A forms – the Court must send copies to CAFCASS to enable them to carry out an initial assessment, and consider whether or not to order a Section 7 report.

- At the first hearing the Court must inform the parties of any report provided by CAFCASS unless to do so would put a party or the child at risk. It must then decide whether it is necessary to hold a finding of fact hearing before proceeding to decisions regarding contact or residence. If it decides such a hearing is unnecessary it must record its reasons.

- If the Court decides a finding of fact hearing is required it should direct witness statements from the parties and an exchange of statements with response in order to clarify the details of the allegations and responses to them. If necessary it should also direct reports from police, health and social services and any other evidence required.

- The Court must decide whether or not the child should be made a party to the proceedings and be separately represented. If the case is in the Magistrates' Court it may be appropriate at this stage to transfer it to the County Court. Pending the outcome of the hearing the Court must decide if an interim order for contact or residence is appropriate and safe.

- When the Court fixes a finding of fact hearing it must also fix a hearing for determination of the application. This should be before the same judge or, in the Magistrates' Court, before at least the same chairperson of the justices.

  Note: that there was dispute over this ruling prior to the reissue of the Practice Direction, and that established case law – M v A (Contact: Domestic Violence) [2002] 2 FLR 921 (Fam Div) – indicated that the hearing must be before *all three* original magistrates.

- At the finding of fact hearing the Court must make findings of fact as to the nature and degree of any domestic violence alleged and as to its effect on the child and any other relevant person. The findings must be recorded in writing and copied to the parties and to CAFCASS. The Court may then reconsider its earlier directions regarding the Section 7 report, including the necessity for any expert witnesses. If the allegations are proved the Court should consider the possibility and availability of supervised contact and whether any party should seek advice or treatment as a precondition to any order.

- When the Court makes its order for contact or residence it should do so with regard to the welfare of the child and with the parties present in Court. Where domestic violence has been proved the Court should apply the welfare checklist and consider any harm the child has suffered or is at risk of suffering and the effect of the violence on the child and on the resident parent. The Court should consider if the applicant is motivated by the best interests of the child or by a desire to continue violence and intimidation.

The Court should consider the ability of the applicant to reflect on the effects of his past violence and to change his behaviour. Contact should be ordered only where the safety of the child and the resident parent can be secured.

- In ordering contact the Court should direct whether contact is to be supervised, and if so where and by whom, whether any conditions – such as treatment – should be imposed on the applicant, whether contact should be for a specified period and whether the order needs to be reviewed; if so a date should be set. If the Court considers direct contact to be inappropriate it should consider indirect contact. The Court must make clear in its judgement how its findings on the allegations have influenced its decision, and explain, if it has ordered contact or residence, why it has taken the view that it is in the best interests of the child to do so.

It is easy to understand why fathers' groups find this sort of guidance unacceptable. The perpetrator of domestic violence is referred to throughout by the male pronoun; the victim is assumed to be the resident parent, the vast majority of whom are mothers. The welfare of the child is assumed to be dependent on that of the resident parent, the mother. The applicant – nearly always the father – is assumed to be motivated by the desire to continue violence and intimidation. And so on.

10.3. Domestic Violence

10.3.1. Definition

A large proportion of Family Court disputes involve allegations of domestic violence – perhaps as many as 85%. A significant industry has evolved to take advantage of this, to promote its own politicised agenda, and to broaden the definition of domestic violence to the point of meaninglessness.

In a widely reported case, **Yemshaw (Appellant) v London Borough of Hounslow (Respondent) [2011] UKSC 3**, the judge, Lady Hale, clarified that violence signified not merely physical violence, but also 'conduct which puts a person in fear of physical violence' (rightly or wrongly), and even 'strength or intensity of emotion; fervour, passion'.

There is clearly a problem when a definition is diluted to such an extent that it ceases to discriminate between behaviour which anyone would agree was unacceptable and normal, everyday behaviour, and after Lady Hale's contribution Lord Brown raised his concern that it is necessary for the law to be able to distinguish between 'verbal or psychological abuse', which should come under the heading of 'harassment', and actual physical violence.

Not everyone can accept Hale's definition, the Legal Services Commission, for example, when it becomes obliged to award legal aid only in cases of domestic violence, will have to adopt a much more tightly defined definition. This means that across the family justice and domestic violence industries a variety of definitions are used.

10.3.2. The feminist paradigm

Feminism teaches that there is an elaborate conspiracy against women run by the 'patriarchal hegemony', in which 'men who assault their wives are actually living up to cultural prescriptions that are cherished in Western society — aggressiveness, male dominance and female subordination — and they are using physical force as a means to enforce this dominance.'[310] Despite the huge advances in women's rights over the last century, feminism has not modified this narrative, nor advanced from its position that all women are victims.

The Marxists had spoken of the 'cultural hegemony', a term coined by Antonio Gramsci, as the means by which capitalism was sustained. The capitalist ideology was imposed on the proletariat to such an extent that its precepts became accepted as 'common sense' values and obliged the working class to identify their own good with that of the bourgeoisie. The feminists adapted the term when they spoke of the 'patriarchal hegemony' and set about undermining and destroying the 'common sense' which regarded the family as the foundation of society. To the feminists the family was instead 'a seething nest of abuse from which battered wives and molested children may at any time need to be rescued'.[311]

Radical feminism teaches that male-based, patriarchal authority and power structures have to be swept away before society can be reformed. These violent and oppressive structures include the family and heterosexual marriage. Some extreme radical feminists, the 'separatists', believe that all heterosexual relationships between the sexes have to be eliminated. In order to sustain this ideology the feminists have to invent an explanation of violence within intimate relationships which is entirely at odds with reality; this has successfully become the dominant version of domestic violence within our culture. Accepted hook, line and sinker by the various components of the family justice system it has also come to determine the fate of hundreds of thousands of children.

Wife-battering forms part of normal marital relations: a cultural construct which has cultural approval. The arena in which this violence takes place is the family, and the family is thus an institution portrayed as hostile to women's interests and which must therefore be eradicated. In the domestic violence media campaigns domestic violence against men is rarely mentioned, and although if pressed Women's Aid and others will reluctantly admit that men and boys can occasionally be victims, they will excuse violence perpetrated by women as defensive.[312] Subsequent research[313] showing levels of female violence equivalent to male levels is met with scepticism:[314] it

[310] Dobash, R. E., & Dobash, R. P., *Violence against wives: A case against the patriarchy*, New York, Free Press, 1979
[311] Peter Hitchens, *The Abolition of Liberty*, Atlantic Books, 2003

[312] E.g. Bograd, M., *Feminist perspectives on wife abuse: An introduction*, In M. Bograd, & K. Yllo (Eds.), *Feminist perspectives on wife abuse*, Beverly Hills7 Sage, 1988
[313] E.g. Stets, J., & Straus, M., *Gender differences in reporting marital violence*, *Physical violence in American families* (pp. 151–166), New Brunswick, NJ, Transaction Publishers, 1992; Stets, J., & Straus, M., *The marriage license as a hitting license, Physical violence in American families* (pp. 227–244), New Brunswick, NJ, Transaction Publishers, 1992; Straus, M. A., & Gelles, R. J., *How violent are American families?* in M. A. Straus, & R. J. Gelles (Eds.), *Physical violence in American families* (pp. 95–108), New Brunswick, NJ, Transaction Publishers, 1992; Straus, M. A., Gelles, R., & Steinmetz, S., *Behind closed doors: Violence in the American family*, New York, Anchor Books, 1980
[314] E.g. Dobash, R. P., Dobash, R. E., Wilson, M., & Daly, M., *The myth of sexual symmetry in marital violence*, Social Problems, 39(1), 71–91, 1992; Jaffe, P., Lemon, N., & Poisson, S. E., *Child custody and domestic violence: A call for safety and accountability*, Thousand Oaks, Sage, 2003

doesn't fit the paradigm. Most research concentrates exclusively on male violence: it is believed that a greater good of women's rights and the protection of women should prevail over scientific accuracy and objectivity. Data inconsistent with the paradigm are dismissed, ignored, or explained away.

The great irony is that all data used to shore up this paradigm comes from those countries in which the gender empowerment of women is the greatest. Research reveals plainly that society does *not* condone spousal abuse.[315] Intimate violence is *not* specific to men and cannot be explained on the basis of gender or gender roles.[316]

Parents who naïvely petition the courts to resolve acrimonious disputes over custody and access find they have walked blindly into a feminist tribunal in which they are at the mercy of laws designed not to safeguard fragile relationships but to turn their child into a state-owned resource, ripe for exploitation by a rapidly metastasising legion of social workers, child psychologists, solicitors, barristers, expert witnesses and other parasites. Child custody and divorce are just additional politicised weapons in the feminists' arsenal.

In this false paradigm contact between a father and his child is fraught with danger: fathers are inherently abusive to their children, a child is at greater risk when with a father than with a mother, and fathers must therefore justify any wish to have contact with their children and prove themselves to be 'safe'. This paradigm has provided us with the 'Duluth Model' of intervention. This is an inter-agency, multi-disciplinary approach designed to enable local authorities to intervene effectively; it was developed in the early 1980s within the women's refuge community in the city of Duluth, Minnesota. It is based strictly on the assumption that 'violence is patriarchal' and that 'women and children, and some men are vulnerable to violence because of their unequal social, economic, and political status in society'. The model focuses solely on the violence perpetrated by men in a relationship, and encourages them to change their behaviour. The problem with the model is that it ignores the reality of intimate partner violence and was developed by people who were political campaigners and not therapists. It is widely used, but perpetuates the feminist myth, causing immense damage to relationships between fathers and their children.

One of the goals of the Women's Aid campaign is to restrict contact between fathers and their children following separation. They state, 'we believe that legislation is still required to create a rebuttable presumption in family proceedings legislation that child contact is not awarded unless and until it can be shown to be safe, and that this should be done through a mandatory risk assessment process'.[317] To promote this policy they rely on the claim that court-ordered contact with fathers exposes children to unacceptable risk.

315 Simon, T. R., Anderson, M., Thompson, M. P., Crosby, A. E., Shelley, G., & Sacks, J. J., *Attitudinal acceptance of intimate partner violence among U.S. adults*, Violence and Victims, 16(2), 115–126, 2001

316 Dutton, D. G., *Patriarchy and wife assault: The ecological fallacy*, Violence and Victims, 9(2), 125–140, 1994

317 Women's Aid response to Government Green Paper, *Parental Separation: Children's Needs and Parents' Responsibilities*, October, 2004

In 2004 Hilary Saunders, the Women's Aid 'Children's Policy Officer' prepared a now infamous report[318] which purported to show that court-ordered contact had time and again resulted in violent homicide and that the Family Courts were so irresponsible and biased in favour of fathers that they were knowingly sending innocent children to their deaths. Saunders claimed 29 children in 13 families had been killed during contact (and one during residence) over the 10 year period from 1994 to 2004. She claimed 5 of these children had been murdered merely so that the father could 'take revenge' on the mother.

The judiciary was alarmed by the allegations made against their members. In March 2006 Judge Nicholas Wall undertook a review[319] of Saunders' claims; he found that:

- 18 of the 29 children had never been subject to any court proceeding at all;
- in only 5 of these cases had the children been killed during court-ordered contact;
- and in only 3 cases could it be argued that the Court could reasonably have made a different decision.

He concluded, 'I am in no doubt that all the Contact Orders in the cases concerned were made in good faith.' Women's Aid protest that 'if it had not been for Hilary's research, it is unlikely that the concerns would have achieved the attention they did.'[320] Wall's review did nothing to put an end to the campaign against contact, and the Saunders report continues to be quoted and has been influential in perpetuating the myth that court-ordered contact with fathers is hazardous for children. The relentless pressure from 'gender racists' has resulted in changes to policy: risk assessments are now mandatory, and the new Private Law Programme, which came into effect on 1st April 2010, is predicated on an assumption that a parent seeking contact intends harm to his child.

Domestic violence is not, sadly, exclusive to men. Some research, indeed, shows that rates of female violence are actually higher than for males,[321] particularly among women under the age of 30. Martin S Fiebert has painstakingly compiled a meta-analysis of no fewer than 275 studies 'which demonstrate that women are as physically aggressive, or more aggressive, than men in their relationships with their spouses or male partners. The aggregate sample size in the reviewed studies exceeds 365,000'.[322] The studies demonstrate consistently that women are more likely than men to initiate both mild and severe violence. It isn't politically correct to say it, but the strongest predictor of a woman being the victim of intimate violence is

[318] Saunders, H., *Twenty-Nine Child Homicides: lessons still to be learnt on domestic violence and child protection*, Women's Aid, 2004
[319] Wall, N., *A report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled Twenty-Nine Child Homicides: lessons still to be learned on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement*, March 2006
[320] Jackie Barron, Research and Policy Officer, Women's Aid, February 2007
[321] Kessler, R. C., Molnar, B. E., Feurer, I. D., & Appelbaum, M., *Patterns and mental health predictors of domestic violence in the United States: Results from the national comorbidity survey.* International Journal of Law and Psychiatry, 24, 487–508, 2001
[322] *References examining assaults by women on their spouses or male partners: an annotated bibliography*, Martin S. Fiebert, Department of Psychology, California State University, Long Beach, 2010

her own perpetration of violence.[323] Recent research by Deborah Capaldi shows that women are at greatest risk of violence from an intimate partner when they themselves initiate violence.[324]

This is not the only way of regarding domestic violence, and some recent studies have presented us with a profoundly different insight. In an article for the American Journal of Public Health[325] D Whitaker and others investigated the frequency of reciprocal (in which a victim is also the perpetrator) and non-reciprocal violence, using a large sample size of 18,761 respondents. The study showed some degree of violence to be a component in a quarter of relationships and that in half of these the violence was reciprocated. In 70% of those cases in which violence was not reciprocal the perpetrator of the violence was the woman. Reciprocal violence was more often associated with injury regardless of gender.

In an article in the Journal of Violence and Victims[326] J H Williams and others describe how research conducted by the University of Washington's Social Development Research Group revealed that twice as many women as men admitted to perpetrating domestic violence in the past year 'including kicking, biting, or punching their partner, threatening to hit or throw something at their partner, and pushing, grabbing, or shoving their partner'. They found correlations with a diagnosis of an episode of major depression, being on welfare, and having a partner who used drugs heavily, sold drugs, had a history of violence toward others, had an arrest record, or was unemployed. Living in an area of higher violence and drug use also increased a person's likelihood of committing domestic violence. The authors concluded 'that it may be possible to prevent some forms of domestic violence by acting early to address youth violence. Our research suggests the earlier we begin prevention programs, the better, because youth violence appears to be a precursor to other problems including domestic violence'.

A study by George Hosking for the Wave Trust[327] confirmed this conclusion. He contradicted the feminist orthodoxy that all men are necessarily violent; instead violence is 'neither universal nor inevitable, but a behaviour that is caused and can be prevented'. He pointed out that 'many societies have existed without discernible inter-personal violence'. Violent behaviour, Hosking stated, arises from 'an interaction between two components'. The first of these are the personal factors which cause an individual to have a propensity towards violence. The second is the influence of external triggers or social factors; these will be harmless and will not contribute towards violence unless there is a pre-existing propensity.

Creating a propensity towards violence exploits the way in which the infant brain develops; the factors which lead to violence are not so much psychological as physiological. Ill-treatment of an infant before

[323] Whitaker D, Haileyesus T, Swahn M, Saltzman L, *Differences in frequency of violence and reported injury between relationships with reciprocal and nonreciprocal intimate partner violence,* American Journal of Public Health, 2007

[324] Deborah Capaldi, Ph.D, of the Oregon Social Learning Center, in presentation at the Los Angeles conference *From Ideology to Inclusion 2009: New Directions in Domestic Violence Research and Intervention*, June 2009

[325] Whitaker D, Haileyesus T, Swahn M, & Saltzman L, *Differences in frequency of violence and reported injury between relationships with reciprocal and nonreciprocal intimate partner violence*, American Journal of Public Health, 2007

[326] Williams JH, Van Dorn RA, Hawkins JD, Abbott R, & Catalano RF, *Correlates contributing to involvement in violent behaviors among young adults, Journal of Violence and Victims*, 2001

[327] George Hosking, *A Tale of 10 Children*, the Wave Trust, 2009

the age of 3 causes the brain to develop structurally in such a way as to cause a violent propensity. The fundamental consequence of such ill treatment is the absence of empathy: the result of the failure of the child's parents to attune with their infant. Absence of empathy combined with harsh discipline will result in the creation of violent, antisocial individuals. These damaged people are then triggered to violence by external, social factors such as 'unemployment, poor housing, over-crowding, economic inequality, declining moral values and stress'.

Hosking emphasised that because these external factors are cultural, increasing and difficult to reverse there is a 'strategic imperative' to reduce the number of people with a propensity to violence. The most effective way to achieve this is to ensure that infants grow up in an environment which promotes the development of empathy through encouraging and supporting parents to attune with their infants.

Erin Pizzey, founder of Women's Aid and Britain's first shelter for battered women, confirms Hosking's understanding that domestic violence is a pattern of behaviour learned in early childhood, 'Some children who are exposed to violence at the hands of their primary carers, usually their mothers and fathers, internalise the abusive behaviour and thereafter use violence and abuse as a strategy for survival.'[328] For Pizzey violence is perpetrated by both men and women, 'I'm not interested in discussions about how many men hit women or how many women hit men because it's quite simple. If children are born into violent families, both boys and girls will be infected.'[329] Today Women's Aid has become hijacked by extremist feminism, the triumph of which, Pizzey believes, has enabled violent, abusive women 'to sexually abuse, batter and intimidate their children and their husbands' with the full support of a politically correct state,[330]

> *They took their aggressive, bullying and intimidating behavior with them. Talking with the men who were accused of abusing their women, I was aware of this movement with its wild and extravagant claims against men had fuelled the flames of insecurity and anger in men. I watched horror stricken, as in home after home, I saw boys denied not only their access to their fathers, but also access to all that was normal and masculine in their lives.*[331]

> *I think feminism now believes that true liberation can only be achieved through destruction of the traditional family and, in particular, men's role. The search for equality has been hijacked by these 'gender feminists'. Militant ideology is being allowed to triumph over practical experience.*[332]

[328] Ibid.
[329] Interview on Australian radio channel Dads on the Air, 22 May 2007
[330] Pizzey, E., *How Women were Taught to Hate Men*
[331] Ibid.
[332] Quoted on BBC2 TV series *Counterblast*, 30 March 2004

10.3.3. Sturge & Glaser

We have briefly mentioned above the report[333] by the two child psychiatrists Claire Sturge and Danya Glaser which was commissioned in 2000 to help resolve four cases in the Court of Appeal, Re: L (Contact: Domestic Violence), Re: V Contact: (Domestic Violence), Re: M (Contact: Domestic Violence) and Re: H Contact: (Domestic Violence) [2000] 2 FLR 334.

As so often happens in family justice, the views of two individuals which are not necessarily representative of the current state of research have come to dominate the way in which courts approach and deal with domestic violence and allegations of domestic violence; it was influential in the development of the CAFCASS risk assessment under Section 16A of the Children Act and in the **Practice Direction** on domestic violence. The report does not carry the authority of its authors' ruling body, the Royal College of Psychiatry, and has been neither debated nor adopted by them: it remains a personal statement.

The report is fundamentally driven by the doctrine of the primary carer which we presented in the Introduction. In this paradigm the position of the primary carer is unassailable and her moral supremacy is incontestable. The crime of domestic violence is considered as a transgression against the primary carer, and its impact on the child is viewed in the context of the effect on the primary carer rather than directly on the child, thus the effect on the child of witnessing violence against his mother becomes very important. Such a viewpoint is essentially a feminist one and the feminist judge Brenda Hale has incorporated it into new legislation.

The application of a father to have contact with his children is regarded with deep suspicion because access to the child can take place only through the mother, and the impact on the mother of the application is what matters to the authors, while the right of the child to have contact with his non-resident parent is secondary.

Sturge and Glaser advocate that the Court should begin therefore by demanding to know the purpose of any application by a father to have contact with his child, stating that contact should only take place where it benefits the child. While listing briefly some of the benefits conferred by contact with a non-resident parent, the bulk of their evidence is concerned with the risks proposed by contact. Contact has the potential to escalate discord, they report; it undermines a child's stability and his sense of wellbeing, it causes conflicts of loyalty and gives a child the sense that the conflict is his responsibility. The authors conclude that contact within a contested contact case will always be harmful, and should only take place where it is supportive to the resident parent,

> *If anything the assumption should be in the opposite direction and the case of the non-residential parent one of proving why he can offer something of such benefit not only to the child but to the child's situation (i.e. act in a way that is supportive to the child's situation with his or her resident parent and able to be sensitive to and respond appropriately to the child's*

[333] C. Sturge & D. Glaser, *Contact and Domestic Violence – The Experts' court Report*, Fam. Law 615, 2000

> *needs), that contact should be considered. We should go as far as to suggest… a position in which a father who has been found to be domestically violent to the child's carer should need to show positive grounds as to why, despite this, contact is in the child's interests in order for an application to be even considered.*

The terrible consequence of the Sturge and Glaser report is that their approach has been applied indiscriminately to all cases. Contact is reinterpreted not as the child's right but as a father's unreasonable intrusion into the mother's life. They emphasise that the question of what purpose is to be served by paternal contact must be answered in every case, regardless of whether there is violence. The alternative view is that in contact situations domestic violence against the mother is largely irrelevant and has no implications for parenting. Parents involved in contact disputes do not live together and scarcely see each other, making opportunities for domestic violence non-existent or rare. Where there has been violence in the past common sense provisions can easily be introduced, for example to arrange handovers without parents having to meet.

Sturge and Glaser's demands condemn parents to repeat the past and prevent progress and resolution. They insist that if contact is to take place at all the father must acknowledge his perpetration of violence and his responsibility for it; he must accept the inappropriateness of domestic violence in the context of parenting and its effect on his child; he must be fully committed to his child's welfare and he must express his regret and his desire to make reparation to the mother. This insistence that the father heal his relationship with the mother before contact can take place is misguided: the relationship has ended and the parties must be allowed to move on; handovers can take place without their meeting – little of this is truly child-centred and will be perceived by the father as deeply humiliating.

One of the most controversial aspects of the report is its blunt statement that parental alienation syndrome simply does not exist; at least such pig-headedness avoids the necessity of arguing the point. In support of this position they cite only one authority, Kathleen Faller, a social worker from Michegan. This stance enables the authors to give the child's wishes undue credence and to claim that countering a child's wishes not to have contact is insulting and discrediting to the child and should only happen where there is a real prospect of the child changing his view. Again they cite only one authority to support this position, the Oxford academic John Eekelaar.

Sturge and Glaser prefer to describe the behaviour behind parental alienation as implacable hostility, but since that also does not have official recognition and the two phenomena are actually quite distinct, theirs isn't a helpful suggestion. Their view doesn't reflect the general view within the psychiatric profession either, though the profession is still reluctant to use the term, particularly given the likelihood of the courts rejecting expert evidence which refers to it.

Not everyone agrees with the Sturge and Glaser report and dissent is growing; Dr Ludwig Lowenstein writes about the process of parental alienation,[334]

[334] L.F. Lowenstein, *"Real" justice for non custodial parents*, 2006, http://www.parental-alienation.info/publications/42-reajusfornoncuspar.htm

Sturge & Glaser would accept the right of the child to refuse contact with a parent and they consider it best to act upon it. I would strongly disagree. It is here not the child giving the opinion but the alienator! It must be remembered that the child is under the total control of the custodial parent. It must be necessary to look beneath what the child claims is a decision for not wishing contact with a parent.

Sturge & Glaser prefer a slow, gradual process, sometimes commencing with indirect contact, to supervised contact leading by slow steps to direct contact. This approach is unlikely to be effective since during all this time, the alienation process continues unabated. Using the Sturge and Glaser method the child's views are not altered and cannot be altered. The child's attitude and behaviour often becomes worse... Such behaviour is encouraged directly or subtly against the now hated former partner.

10.3.4. Everybody's business

The Sturge and Glaser report prompted a response from the Family Justice Council titled, *Everybody's Business – How applications for Contact Orders by consent should be approached by the Court in cases involving domestic violence*, and these recommendations were sent to the President of the Family Division.

The Family Justice Council (FJC) is a 30-strong quango of senior family judges, lawyers and a handful of social workers and paediatricians which sits between Government and the Family Courts. It monitors the effectiveness of the family justice system and advises on reform. The sole representative of parents on the council is Bridget Lindley, who works for the Family Rights Group, a charity working with parents whose children are involved with social services. There is no representation from parents involved in private family law. In 2004 the FJC produced a research paper, *Child contact with non-resident parents,* by Joan Hunt and Ceridwen Roberts which claimed that paternal contact was not necessarily good for children. In our dossier *Family Justice on Trial* we showed that this paper relied on a selective and incomplete reading of research by Professor Marjorie Smith which dealt with children's relationships with *step* parents.

Of particular concern to the FJC were three cases – TB, CF and OF – covered by Lord Justice Wall in his response to the Women's Aid *29 Child Homicides* report. In TB the Court had made a consent order despite the fact that contact had previously been suspended after the child phoned his mother to say his father had hit him. There was a lack of judicial continuity in the case.

In the case of siblings CF and OF numerous allegations of violence and assault had been made, including the charge that the father had raped the mother at knifepoint. Despite this, interim contact including staying contact was ordered, contrary to the recommendations of the Court Welfare Officer. On the children's first contact visit the father hanged them and killed himself.

These were extreme and exceptional cases in which contact had been ordered by consent – the mothers supported contact. The FJC nevertheless applied their findings in these cases to applications to contact generally, saying in *Everybody's Business*, 'there is no empirical

evidence of the positive benefits of contact per se', citing as their source the flawed Hunt and Roberts report. The reality is that the evidence is overwhelming. The FJC then made recommendations which were to be applied to all cases:

- The court culture should change to approve contact only where it can be shown to be safe;
- A new practice direction should be issued concerning how courts are to respond where allegations of violence are made;
- There should be greater emphasis on making the child's safety paramount (thus the child's welfare was equated with safety from paternal violence);
- Risk assessments should be undertaken in every case where there are allegations of DV;
- There should be improved training on DV for lawyers and judges;
- New court forms should be issued to enable courts to identify where DV is taking place and to obtain information earlier;
- The Family Law Protocol should be revised to include consideration of a child's welfare as part of a solicitor's duty;
- A feedback system to judges should be established to alert them where an order leads to harm (F4J have been demanding this for years);
- There should be consideration by the Courts Service and Department of Education of how the court process can be included within serious case reviews.

The 1989 Children Act had been intended to introduce a non-interventionist approach in which courts would not make orders unless compelled to do so; orders by consent were expected to encourage parents to come to the courts with their own suggestions for settlement. The FJC concluded – on the evidence of two cases – that this approach was flawed and meant insufficient attention was being paid to the safety of children and of their resident parents.

The Hunt and Roberts report had already cast doubt on the benefits to children of paternal contact; it emphasised the quality of contact over the quantity: contact with a loving and supportive parent was good; contact with a parent accused of violence was bad. The consequent shift of emphasis onto DV meant all applications for contact now had to argue why contact was beneficial to the children.

We do not underestimate the effect of domestic violence on children who experience or witness it, but the systemic response to it has now become disproportionate, and the various measures introduced – the new forms which assume DV to have taken place, the risk assessments, the revised training and procedures – place so many obstacles in the path of a father that a simple application for contact is now regarded as an act of domestic violence in itself. Far from being impartial and independent the Family Justice Council has shown itself to be partisan and unreliable.

10.3.5. Neglect & child abuse

Contrary to popular prejudice, all forms of abuse except sexual abuse are more likely to be perpetrated by a child's mother than by the father, and the discrepancy in sexual abuse statistics may be the result of under-reporting. A study by the NSPCC, Child Maltreatment in the UK, 2000, showed 49% of children abused in the home were abused by their mothers and 40% by their fathers.[335] A second report, Child Maltreatment in the Family, 2002, showed that 65% of total child abuse (neglect, sexual, emotional and physical) is committed by mothers and only 8% by fathers.[336]

Despite these figures, the Family Courts and child protection services operate on the basis that separated fathers present a threat to their children.

If your child is being neglected or abused or is at risk you must make this clear when you make your application and fill out forms C1A and C2. This obliges CAFCASS, who are otherwise reluctant to take action against resident parents, to take the issue seriously. You must then produce incontrovertible evidence. You won't get sole residence because you are a non-resident parent, and probably incorrectly gendered, but you can get shared residence if CAFCASS see that you are a good parent and you can then build from there.

[335] Cawson, P., Wattam, C., Brooker, S., and Kelly, G., *Child maltreatment in the United Kingdom: a study of the prevalence of child abuse and neglect*, November 2000, NSPCC.
[336] Cawson, P., *Child maltreatment in the family: the experience of a national sample of young people*, February 2002, NSPCC.

If the Court is concerned about the welfare of your children while in the care of the resident parent, it can order CAFCASS to undertake a Section 37 report. For more information on these, refer to **Chapter 16**.

The courts routinely ignore neglect or abuse by a resident parent. If you are concerned about your child's welfare ask that the Court direct CAFCASS to prepare a welfare report. In your application to the Court consider the other parent's past medical record and any other medical evidence which would:

- influence whether it is in the child's best interests that this parent should have sole custody;
- establish whether there are any grounds for your concerns;
- determine if there are any reasons to deny you shared parenting;
- identify any concerns about the other parent's mental health, and whether the Court should have access to their medical records and treat any condition as evidence.

Sometimes it takes the children contacting social services themselves to say that they have been left alone before anything is done. It may take several incidents, but each one will be logged by social services and should then provide you with the evidence you need. If social services won't listen to you, get a grandparent to make the call, if that doesn't work, persuade social services to phone the house and speak to your children. They can be very, very reluctant to get involved, and of course, you take a huge risk that your children will be taken into care

and you will lose contact with them entirely. Be careful before you get social services involved, and do so only if there is a substantial threat to your children's wellbeing or lives.

If the neglect is sufficiently serious and the home is filthy, and your children are eating contaminated food, etc, an alternative to social services would be the environmental health services. They will document what they find and take samples, and you can then use this evidence in court. Contact them through your local council.

Alternatively, if your children are dirty, malnourished, injured or ill take them to your GP and ask that the health visitor intervenes; you could even take them to the local A&E department.

If your children have symptoms such as worms, nits, rashes, incontinence, bedwetting, bruises, etc, you must document them, and if in a non-intimate area you should take photographs of any visible signs of neglect or abuse. Place a ruler alongside the place on your child's body so that you have an accurate indication of size and try to use a camera which adds the date and time to the shots (most digital cameras will add this information to the file). Photographs of intimate areas could obviously land you in trouble and should be avoided. Always make a note of the state your child is in at the start of handovers – are they clean, do they smell, are their clothes clean and in a good state of repair, etc?

If your children are being physically or sexually abused contact the police and ask to see the child protection team.

The priority is to ensure that your children are SAFE. You can worry about residence later. An application to transfer residence at this stage can appear malicious.

Once they are safe and in your care you can then make an *ex parte* application using the C100 and C1A forms on 48 hours' notice to the other side (an abridged notice); you will have to pay for this unless you qualify for public funding. Demonstrate to the Court that you have suitable accommodation for your children.

It may be that your children are being abused by their other parent's new partner; some campaigners have based their campaigning on the not unreasonable principle that a father should have the same rights as Mum's latest boyfriend. The grim truth is that whoever is sharing your ex's bed can live in your house, empty your wine cellar, abuse your children and kick your dog. And there ain't a thing you can do about it. The only person who can do anything in this situation is your child, and he should talk to his school about it in the first instance. If you try to do anything it will just be seen as sour grapes and you will end up accused of harassment or worse. Clearly in such a situation your children's other parent is neglecting their responsibilities, and you need to take the actions you would if they were perpetrating the abuse.

10.3.6. Escaping DV

To seek to curtail or sever the relationship between a child and a parent should only ever be contemplated when all else has been tried and has failed, and when the welfare of the child absolutely demands it.

The family justice system provides a variety of alternative options such as supervised or indirect contact which should always be attempted first. You can also now make an application to the Court for a violent parent to attend a programme aimed at addressing violent behaviour (see **Section 13.2.3**).

Both men and women (though it is usually women) can make use of Court Orders designed to control abuse and harassment:

- **Occupation Orders** – exclude the abuser from your home and enable you to remain there;
- **Non-Molestation Orders** – restrain the abuser from causing or threatening you or a member of your household;

Tragically, all too often these measures are sought by a parent for entirely self-interested reasons. The result is that facilities, such as for supervised contact for example, are oversubscribed by parents whose former partners do not need to be supervised and parents who do genuinely need these facilities will have to wait 6 months or more to access them.

If your child is really at risk of serious harm from his other parent you will need to take urgent action.

If you are the *de facto* resident parent this will be easier. You need to turn your situation into legal residence by applying to the Court for a sole Residence Order. Fill out **Form C100** and take it to the Court with the appropriate fee; advice on completing the form is given in **Section 6.2.4**. You will also need to complete **Form C1A** on which you give brief details of the nature of the risk to your child.

If the threat to your child is immediate you must apply *ex parte* and without notice. This procedure is also explained in **Section 6.2.8**.

If you are *not* the resident parent getting sole residence will be much more difficult and you are advised initially to apply for shared residence. The procedure is the same, and you are likewise advised to apply *ex parte* and without notice.

Note: that any application is likely to be answered by a counter application and the inevitable arms race of false accusations, delayed hearings, etc. Starting any proceedings in the Family Courts is a major commitment.

If both you and your child are at risk of violence or abuse from your child's other parent (or step parent) you may decide to leave your home. You will need to plan this carefully and surreptitiously. Remember to take vital documents with you as you may not be able to return. These will include:

- birth certificates;

- passports and visas;
- bank statements, cheque books and credit cards;
- pay slips and employment details;
- documents relating to pension plans;
- documents relating to the ownership of your home or tenancy agreements;
- insurance documents;
- your driving license and car registration documents;
- your court files and copies of Court Orders;
- your address book;
- if you leave your computer behind, copy any files you need and then reformat the drive.

If you move to a new address,

- Remember any medications for yourself and your child, toiletries, and your child's favourite toys;
- Do not return to any places you regularly frequent, such as shops, pubs, banks, etc. Do not follow any of your old routines: change regular appointments, change your route to work;
- Inform your child's school and your employer of what is going on and keep them up-to-date;
- Don't use joint bank accounts and keep your new address off any subsequent court documents and orders. The courts should cooperate with this.

Remember that if you are a father you will probably be accused of abducting your child and you will be pursued by the police.

If you are a mother you will be able to get an Occupation Order and remain in your home. You should also do the following:

- Inform the local police;
- Revise the security on your home: change the locks and install outside lights;
- Inform the neighbours;
- Change your telephone number and go ex-directory.

Keep a record of any attempts by your former partner to harass or threaten you or your child.

If you cannot remain in your home as a result of domestic violence and have nowhere else where you can go, your local housing authority has a duty to help you find accommodation and should provide you with temporary or emergency accommodation – usually in a B&B.

You may also wish to contact the specialist organisations which provide refuges for the victims of domestic violence. Most refuges for women are run either by *Women's Aid* or by *Refuge*, and they jointly operate a 24-hour helpline: **0808 2000 247**. They also provide other support and advice, including legal advice.

Women's Aid and Refuge are fiercely anti-male and follow the feminist line on domestic violence closely. They do not provide services for men, and generally will not admit boys over the age of 12. They are inclined to indoctrinate women who seek their support and know all the tricks for preventing contact.

If you are a man the services available to you are fewer, poorly funded and hard to find; there are over 500 refuges in the UK for women and only 12 for men. This is in spite of the facts that women are more likely to abuse children and more likely to initiate domestic violence.

One of the expected consequences of the new Gender Equality Duty, created under the Equality Act 2006, was that women-only charities such as Women's Aid would have to start providing support to male victims of violence and abuse or they would lose their very generous government funding.[337] Needless to say this has not happened.

Your best first port of call is **Men's Aid**, a charity and campaigning organisation. They run a help line 7 days a week, from 8am to 8pm.

[337] Lucy Cockcroft, *Women's refuges told to help male domestic violence victims or lose their funding*, Daily Telegraph, 5 April 2009, http://www.telegraph.co.uk/news/uknews/5109310/Womens-refuges-told-to-help-male-domestic-violence-victims-or-lose-their-funding.html

The more politically correct (and Government-approved) **Men's Advice Line** provides support Monday to Friday, 10am to 1pm and 2pm to 5pm: 0808 801 0327.

Note: that all Government-run and Government-approved charities and agencies follow the line that father absence is the fault of fathers, and they therefore promote a concept of 'responsible fatherhood' which is doomed to failure because it is based on a falsehood.

10.3.7. Witnessing DV

Feminists have worked hard to extend the definition of domestic violence to include activity which most would never consider to come under this heading. They have become particularly agitated about children who allegedly witness scenes of domestic violence between their parents. The feminist judge and law-lord Baroness Hale added an amendment to the Children Act definition of 'harm' in **Section 120** of the Children and Adoption Act 2002 to include:

> *impairment suffered from seeing or hearing the ill-treatment of another.*

This was intended to ensure that fathers who were 'violent' (within the feminist classification) towards their partners, but not towards their children, would still be denied contact, but the effect has rebounded with some children being removed from their parents altogether. It is important to stress that there is no scientific justification behind this legislation: it is entirely the result of successful political lobbying.

There is no reason to suppose that a father who genuinely has been violent towards his partner will necessarily be violent to his child.

A case from the US[338] shows that witnessing domestic violence is only sometimes, and not always, harmful to children; and even when witnessing domestic violence does harm, removing the child from the non-offending parent causes greater harm. A review of studies showed that children had a remarkable capacity to develop normally once in an environment of safety and security.

Several expert witnesses testified about the primacy of the parent-child bond and that the separation of a child from a parent may provoke fear and anxiety and diminish his sense of stability and self.

If you are a mother, beware of the agenda linked to the feminist ideology. The social services, of which CAFCASS is a part, are a huge state bureaucracy which wants nothing more than to create more work for itself and enable the State to intrude ever further into personal lives. Before you allege domestic violence, even where it has taken place, you should consider that children have been taken away from their mothers simply because they have been witnesses to violence against them. It may be that CAFCASS favour mothers over fathers, but they will favour the State over any parent.

[338] Nicholson v Williams, Case #00-CV2229, U.S. District court, Eastern District of New York

10.3.8. CAFCASS & DV

The identification of the risk posed to children by their parents is arguably the key – and very depressing – role of CAFCASS. The real – albeit rare – fact of parental child abuse informs the CAFCASS mind-set: every parent is a potential abuser.

Where a parent has expressed 'welfare concerns' in their **Form C1A** CAFCASS must report to the Court on whether these concerns are substantiated. And yet, as has been made clear in numerous reports by HMICA and now Ofsted, CAFCASS habitually fails to conduct reports adequately. The welfare report template (examined in **Section 7.4.2**) shows clearly that for CAFCASS – as for other UK child protection agencies – 'politically correct' questions such as ethnic origin and disability must be assessed more carefully than any possibility that a child is being abused or neglected.

This is what CAFCASS teach their staff, and it is very much in accord with the Sturge and Glaser report:[339]

- Children and family reporters (CFRs) should always make a presumption of domestic violence even when it has not been alleged.
- They should always be suspicious of the applicant's motivation for seeking contact.

[339] CAFCASS: *Domestic Violence Element 1: Delegates Handout*

- The onus is on the accused parent to demonstrate that he or she can be a positive and constructive influence on the child's life.

- Where domestic violence is alleged, mediation is rarely appropriate.

- Where violence is alleged children fare better when sole maternal custody is awarded and there is little or no paternal contact, **regardless of which partner is violent**.

- The truth of allegations is irrelevant because in cases where they are made the child is by definition the victim of conflict.

It might be surprising to learn that CAFCASS does give its practitioners guidance on identifying where children are at risk; one such source is the *Domestic Violence Toolkit*, which reflects the routine belief of the gender feminist that domestic violence is gender specific, and thus exposes plainly why CAFCASS remains so inept at assessing risk; almost every statement in this passage is false,

> *Older children can begin to replicate the relationship and gender roles that they have witnessed between their parents. In adolescent male children, this can lead to abusive and violent behaviour towards their abused parent and other children as they seek to reinforce dominant male gender roles.*
>
> *Violence by women is less frequent, less likely to result in the same level of injury, and is most commonly interpreted as an active effort by the woman to resist the oppressive coercion of her partner. The context of self-defence or retaliation is different from the context of male violence, which is usually one of punishment or control. Men are more likely to be the first and last to use violence in a dispute.*

The CAFCASS *Toolkit* was first piloted from September to November 2007; an evaluation[340] was published in August 2008 and acknowledged that some users of the *Toolkit* had 'difficulties' with the approach to gender and the placing of blame for domestic violence exclusively on men. Perhaps not all CAFCASS Family Court Advisors are entirely beyond redemption.

One of the reasons child protection in the UK is such a disaster is that domestic violence is seen by the feminist left as the way in which the 'patriarchal hegemony' exerts control over women. Any violence against children is thus seen merely as collateral damage in a war in which the real victims are mothers and not children; indeed, as the extract above makes clear, male children are regarded as part of the problem. Violence by women against children within this ideology simply doesn't happen, and first combating violence against women is viewed as the only logical way to tackle child abuse.

This is one of many reasons why children like Victoria Climbié and Peter Connelly ('Baby P') will never be adequately protected by child protection services. Victoria was known to no fewer than 12 agencies, including 4 social services departments, 2 hospitals and 2 child protection teams. None of these services took the steps necessary to prevent the months of torture which led to Victoria's death. The tortured and abused 'Baby P' was seen by social workers 60 times in 8

[340] Thangam Debbonaire, *The pilot of the Respect/Relate/CAFCASS domestic violence risk identification tool: evaluation report*, CAFCASS, Relate, Respect, August 2008,

months; none of them considered there was any risk to the child who died days after his ribs and back were broken, injuries undiagnosed by his doctor, paediatrician Dr Sabah Al-Zayyat.

An examination of more than 100 child homicide cases since 1944 reveals consistently that child homicide is the result not of an isolated incident but of constant abuse, violence, neglect and malnutrition throughout the victims' lives. At the time of death many of these children are stunted due to poor nutrition, dehydrated and suffering from hypothermia. If social services were doing their jobs most of these cases would have been spotted long before the child died.

Secondly, all of these homicides take place in homes very different from the model married nuclear family. These are enormously dysfunctional families with very complicated relationships constructed around a single mother with children by various fathers and a number of transient adult males, some of whom but not all are the fathers of one or more of the children.

Put simply, it should be relatively easy to identify in which households children are most at risk, and then to monitor them closely.

The reason this doesn't happen is because these families conform to the ideal favoured by the gender feminist ideology: **they are families from which the father has successfully been excised**. Over and over again, and in spite of unambiguous evidence to the contrary, the liberal establishment repeats the lie that family structure is irrelevant to the welfare of children.

10.4. Cases

Finding of fact

Re L, V, M & H (Contact: domestic violence) [2000] EWCA Civ 194, 2 FLR 334/404

M v A (Contact: Domestic Violence) [2002] 2 FLR 921 (Fam Div)

Re M (Disclosure: Children and Family Reporter) [2002] EWCA Civ 1199

Mikulic v Croatia [2002] FCR 720

TH v RB; Re H [2008] EWCA Civ 539

Re H (A Child) [2008] EWCA Civ 980

Re B (Children) [2008] UKHL 35

CHAPTER 11: VOICE OF THE CHILD

> *CAFCASS has been a disaster from Day One. Its officers write tens of thousands of trivial reports each year - on decent families caught up in divorce. CAFCASS breeds heartache and delay. CAFCASS clogs up the system. It's the bottleneck in the divorce system wasting hundreds of millions of pounds a year.*

Theresa May, former Shadow Secretary of State for the Family [341]

11.1. Ensuring your Child is Heard

11.1.1. The dilemma

Article 12 of the United Nations Convention on the Rights of Children provides,

1. *Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law*

Children are rarely heard directly, and their views are usually presented to the court through the medium of a CAFCASS officer. The Children Act demands that the Court considers 'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)'. It is difficult, however, to ascertain what

[341] Theresa May, speaking at the Conservative Party Conference, 2004

these wishes and feelings are, and they can be heavily influenced by parents and by other adults (CAFCASS, experts) who may have an 'agenda'. Even if they are truly the child's own, they may not be in his long term interest.

A child may exhibit distress after contact, but it is not always easy to tell if this is because the contact has been distressing, because returning to the resident parent is distressing, because the resident parent is showing distress as a result of the contact, or because the child is playing one parent off against the other.

Sometimes the resident parent is the one who does all the boring stuff, deals with the school, ensures the homework is done, takes the child to the dentist, handles discipline, while the rarely-seen contact parent does all the fun things. The child may say he wants to go and live with the contact parent, but this is the result of unrealistic expectations.

Older children may just want an easy life, but they will have learnt how to manipulate their parents to get what they want.

It is very difficult therefore to determine what a child really wants, what his best interests are, and where the balance lies. It can become necessary to provide the child with someone they can talk to openly, without being influenced by their parents. One option is for a court which wants an independent view of the child's best interests and what should happen for that child to enlist a Children's Guardian, another is for the child, especially an older child, to instruct their own solicitor.

11.1.2. The voice of the child

The 1989 Children Act obliges the Court at Section 1(3)(a) to 'have regard in particular to the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)' and to 'his physical, emotional and educational needs.'

Children who have only limited contact with one parent and who have possibly been alienated against that parent are bound to favour the resident parent in any assessment of their wishes and feelings. As the Act makes clear, the welfare of the child is paramount and this includes his or her, 'physical, emotional and educational needs'.

There is inevitably much debate about what the minimum age is at which a child can make his or her 'ascertainable feelings' known in court; this age is often put at between 10 and 14 (the age of criminal responsibility is 10 in the UK). The truth is that there is no specified age at which a child can make his or her feelings known; for example, one father won full residence of his son and daughter – then aged 8 and 10 – because they simply refused to return to their mother and also stood up to the usual questioning by social services, etc. CAFCASS, who are criticised for not giving children's views sufficient weight, often quote an age of 11 or 12, based on psychological research by Jean Piaget (1896-1980) who held that a child becomes able to make 'moral' decisions at that age.

Today Piaget is best known for demonstrating that children aren't simply adults who know less; they actually think in a significantly different way. Piaget recognised that a person's behaviour is shaped

by his surroundings, and not only by his internal drives. What a person would do surrounded by other people is sometimes entirely different from what that same person would do if they were on their own or in a strange setting. Children with siblings may well be able to make sensible decisions at an earlier age than lone children. In Piaget's assessment children only begin thinking morally at the age of 12.

As far as the law is concerned children reach maturity at the age of 16 or 18 and it is arguably quite wrong for the courts to expect them to make irreversible decisions about their own welfare before then.

In practice, age *per se* is not the measure, but rather something known as '**Gillick Competence**', named after the case Gillick v West Norfolk and Wisbech Health Authority [1986] AC 112 which concerned the prescription of contraceptives to a minor without the parents' knowledge or consent. The basis of this is a child's intellectual development; in other words, one child might be adamant at 8 years old about their wishes whilst another child of 13 or 14 might not. This of course also makes allowance for children and even adults with learning difficulties – if they are not deemed Gillick Competent their opinions will carry little or no weight.

The 'Gillick Principle' reads as follows,

> *In the Health realm, children are considered competent to make decisions on their own behalf when they are capable of understanding fully the nature of what is proposed. A competent child's refusal should not be overridden, save in exceptional circumstances. The decision as to whether a child is Gillick Competent will usually be taken by health care professionals involved in the child's care, sometimes with input from clinical psychologists, teachers etc.*

In the family law realm whether a child can 'understand fully the nature of what is proposed' will depend not only on their intellectual development but also on the quality of the information given them, which may well be very poor, and beyond even the adults in the case to understand. The definition enables the Court to override the child's wishes if it thinks it necessary.

The Family Courts do not like it when children finally vote with their feet and decide to live with their non-resident parent, contrary to what may by that time be a string of court orders. The usual precedent is Re M (Family Proceedings: Affidavits) [1995] 2 FLR 100: a 12-year-old girl expressed the wish to live with her father; the Court refused, relying on the welfare officer's 'instinct' that she should live with the mother. The father appealed, producing as evidence an affidavit signed by his daughter. Judge Butler-Sloss in the Court of Appeal rejected his application: children should not be allowed to intervene in family proceedings involving their parents; the father's lawyers were condemned for allowing the affidavit; the judge had acted appropriately.

Judges rule differently when children express a desire *not* to have contact with their father; the precedent here is Re S (Contact) (Children's Views) [2002] 1 FLR 1156, though there is no reason not to apply this ruling to other cases:

> *If young people are to be brought up to respect the law, then it seems to me that the law must respect them and their*

wishes, even to the extent of allowing them, as occasionally they do, to make mistakes.

If the Court is dogmatic it is advisable that the child instructs his own solicitor, or you could contact NYAS.

11.1.3. Needs, wishes & feelings

So that it may comply with Section 1(3)(a) of the Children Act the Court may direct CAFCASS to produce a 'Needs, Wishes and Feelings' report. This is a flexible tool which can form a part of the Section 7 welfare report, it can be filed as a Children's Guardian report, as part of a Rule 16.3 report, as part of a Family Assistance Order report, as a 'Wishes and Feelings' statement by a child, as part of Extended Dispute Resolution, or as a source for discussion.

It is rare for a judge to speak directly to a child (he is regarded as having no relevant expertise), and this tool is supposed to fill that gap in the judge's knowledge.

For this purpose CAFCASS have prepared two sets of forms for younger children and for older children which the FCA will complete with the child. These and other resources are available from the **CAFCASS website**. There are other tools which may also be used including computer assisted programmes such as ***In My Shoes*** and *Listening to Young Children* or creative processes like drawing, clay modelling, games, music, drama, storytelling and play.

In an effort to reduce the burden on a collapsing CAFCASS the Interim Guidance issued by the President of the Family Division encouraged the use of short Wishes and Feelings reports as a first step in resolution. The problem is that this softly, softly approach may work in easy cases but simply postpones the point in more conflicted cases at which the issues in the case have to be grappled with.

One danger of Wishes and Feelings reports is that where an alienated child has expressed the wish not to see his non-resident parent that parent and his legal team may be persuaded to give up the quest for contact prematurely.

While it is obviously very important to let the child feel that his voice is heard it is equally important to protect him from the burden of responsibility for the termination of contact which his resident parent has sought to place on his shoulders. No child should have to choose between his parents.

A perceptive guardian should be able to see where a child's expressed wishes and feelings may lead to a result contrary to his best interests. In **Re R (A Child) [2009] EWHC B38 (Fam)** an 11-year-old boy had been alienated against his father; Judge Bond decided to transfer residence to the father, and his decision was upheld in the Court of Appeal, Bond said in his judgement,[342]

As the Guardian has recorded in her reports, R has consistently told her that he does not wish to see his father

[342] http://www.bailii.org/ew/cases/EWHC/Fam/2009/B38.html

and wants contact to stop. As the Guardian had predicted in July 2008 R has become more hostile about his father. If the Court were to act upon R's expressed wishes as to contact it would cease. R has said that he could manage a reduced level of staying contact as the Guardian was at one point suggesting but I think it unlikely that contact, for example for alternate weekends or for a weekend a month would be of value. I think that it would also cease. The process would subject R to the same pressures as at present. In considering the weight to be placed upon his view it is important to record the obvious point that R is older than at the last substantive hearing. The Guardian and Dr M have each considered the question as to whether R is able to express a view which is sufficiently balanced and considered. The advice is that in the particularly difficult circumstances of this case he is not. He has become too involved in the process to the extent that in the Guardian's view he has attempted to control the outcome. At paragraph 19 of her report on page D187 the Guardian described R's portrayal of his time with his father to be characterised by minor niggling criticisms, to be unbalanced and illustrated a determination to find fault. I accept that opinions of Dr M and the Guardian. I therefore listen to and take account of R's view but it cannot be determinative of the result.

11.1.4. Children's guardians

If you are concerned that neither your ex's solicitor nor your own (if you have one) is adequately representing the best interests of your child and the case seems to be dragging on without resolution you can do one of two things. You can request the Court to appoint a Children's Guardian to represent your child and to determine his interests under the welfare check list or you can request that your child is represented separately from his parents by his own solicitor. You may do this at any stage in proceedings and need not give other parties notice. Article 6 of the Human Rights Act protects access to a fair trial, which may well be interpreted in the right circumstances as the right for a child to have separate representation.

This is particularly necessary in protracted and conflicted cases which show no promise of resolution, where there have been allegations of abuse made by one parent, and where one or both parents is unable or unwilling to see the case from the perspective of the child. With separate representation or the use of a Children's Guardian the interests of the resident parent and of the child can at last be viewed as separate: the child thus becomes a player in his case and not a pawn.

A 'Children's Guardian' will be an officer from CAFCASS or from CAFCASS Legal who represents your child independently of either you or your ex, and is present at proceedings in that capacity. A Children's Guardian was formerly known in England and Wales as a 'Guardian *ad Litem*'. In Scotland, where CAFCASS does not operate, a solicitor will perform this function and is known as a '*Curator ad Litem*'. This is the Latin for 'a guardian to a lawsuit'. CAFCASS Legal deals with the more intractable cases. The Guardian will usually also engage a CAFCASS solicitor (through CAFCASS legal) and will then be responsible for instructing him or her. The Guardian will operate much as a normal CAFCASS FCA, interviewing the parties and preparing a report. For a final hearing they will also engage a barrister.

The involvement of a Children's Guardian is now enabled by **Rule 16.3(1)** of the Family Procedure Rules 2010 which replaces Rule 9.5 of the Family Proceedings Rules 1991, so you may still hear reference to a '9.5 order' or to a '9.5 Guardian'. Applications are made under Part 18 using an **FP2 Application Notice**. If you wish to change the Children's Guardian you can do so under **Rule 16.25**; you must provide your reasons and evidence.

You should also be familiar with the **Practice Direction 16A** – *Representation of Children, Part 4 Appointment of Children's Guardian under Rule 16.4, Section 1 – When a child should be made a party to proceedings.*

The Court will agree to appoint a Guardian if it is in the child's best interests to do so (Rule 16.1) and if the child is considered Gillick competent. The Court will then ask CAFCASS that they provide a Children's Guardian (or guardian *ad litem*, since they are still using this term). Understand, though, that you may have to wait months, so only do this in an already protracted case. In some cases a court will order separate representation without application by a party, or on recommendation by CAFCASS. Once appointed the Guardian is treated as a party to the case, and must safeguard the child's interests and assist the Court as it may require.

Only an officer from CAFCASS may act as a guardian in 'specified proceedings' or proceedings under Part 14, i.e. adoption and placement proceedings. Where CAFCASS are unable to provide a guardian, or where they have failed or lost the confidence of the parties and the child you can request the involvement of a representative from NYAS (though you should treat these people with caution) and they can be appointed as a guardian under rule 16.4.

'Specified proceedings' are defined by section 41(6) of the Children Act 1989 and include care and supervision orders and residence and Contact Orders in respect of children who are already subject to care and supervision orders.

New cases in which the child is represented must be referred to in the title as 'A.B. (A Child by C.D. his/her Children's Guardian)'. In proceedings which the child is conducting on his own behalf through his solicitor the case should be referred to in the title as 'A.B. (A Child)'.

Note: that Rule 9.5 applications rose from 1,035 in 2005/06 to 1,269 in 2007/08;[343] these applications are now made in 1 case in 10. There are not the resources available to meet even this demand, and that problem is likely to get worse. There is also a 'postcode lottery' in operation, meaning that judges will order separate representation in some regions but not in others. One reason for this situation seems to be the reduced availability of legal aid lawyers and public funding, and the increased complexity of many cases.

[343] Catherine Baksi, *Child welfare fears add to justice burden*, The Law Society Gazette, 04 September 2008, http://www.lawgazette.co.uk/news/child-welfare-fears-add-justice-burden

11.1.4.1. The benefits of a guardian

In September 2006 the Department for Constitutional Affairs published a consultation paper on the *Separate Representation of Children.*[344] This considered extending the right that children in public law cases have to representation by a CAFCASS Guardian and solicitor to children in private law cases. As things stood such representation was often ordered only after many months or even years of litigation. By this time great damage has been done to the child's relationship with the non-resident parent.

Research by the University of Cardiff [345] showed that such representation is most beneficial in intractable cases but could impose too much responsibility and stress on the child if he or she thought the judge's decision would be based substantially on their view. The report said that children can feel confused and manipulated by their parents, 'repeating unfounded allegations or simply reciting the parent's view to the guardian.'

The report emphasised the need for haste and early assessment and the necessity that CAFCASS guardians are properly trained and trustworthy, with an aptitude to gain children's confidence. It stressed appropriate keeping of documentation and judicial continuity (neither of which, of course, was normal practice in the Family Courts).

The researchers recommended that there should always be separate representation before enforcement under the Children and Adoption Act 2006 (which enables certain sanctions when orders are not obeyed) and that the Guardian should ensure protection of the child from adverse repercussions from the resident parent following an Enforcement Order.

The primary case law precedent you should cite in an application for separate representation is Re A (Contact: Separate Representation) [2001] 1 FLR 715 in which the President of the Family Division considered at paragraph 22 that there may be an increased use of guardians in private law cases in England and Wales, to ensure that a child's perspective is fully explored in the litigation.

> *There are cases when they do need to be separately represented and I suspect as a result of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 becoming part of domestic law, and the increased view of the English courts, in any event, that the children should be seen and heard in child cases and not always sufficiently seen and heard by the use of a court welfare officer's report, there will be an [2001] 1 FLR 720 increased use of guardians in private law cases. Indeed, in the right case I would welcome it. I hope with the introduction of CAFCASS in April of next year when the Court Welfare Service and the Guardian Ad Litem Service will be merged under one umbrella of a national organisation that it will be easier for children to be represented in suitable cases, but one ought not to assume that they will be separately represented in other cases that are less suitable.*

[344] http://www.dca.gov.uk/consult/separate_representation/cp2006.pdf
[345] Douglas, G., Murch, M., Miles, C., and Scanlan, L., *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991*, Final Report to the Department for Constitutional Affairs, Cardiff Law School, 2006 http://www.dca.gov.uk/family/familyprocrules_research.pdf

However, in order to assist CAFCASS to clear its backlog, the President gave further guidance in July 2009 [346] that separate representation should only be ordered in cases which involve an issue of significant difficulty, and only after other alternatives have been explored. In cases requiring purely legal assistance rather than social work skills the Court should consider appointing Guardians from outside CAFCASS.

11.1.4.2. The duties of a guardian

The duty of a Children's Guardian is fairly and competently to conduct proceedings on behalf of the child. They must have no interest in the proceedings adverse to that of the child and all steps and decisions they take must be taken in the child's best interest.

The Children's Guardian must contact and seek to interview anyone they consider relevant to their investigation or whom they have been directed to contact by the Court. If necessary they must contact appropriate experts.

The Guardian must appoint a solicitor for the child unless a solicitor has already been appointed. They must advise the child giving appropriate regard to the child's understanding and they must instruct the solicitor on all matters relevant to the interests of the child arising in the course of proceedings unless the child wishes to instruct a solicitor directly and the Guardian or the Court considers the child to be of sufficient understanding to do so.

A Children's Guardian or the solicitor must attend all directions hearings unless the Court directs otherwise. They must advise the Court orally or in writing on:

- whether the child is of sufficient understanding, including the child's ability to refuse or submit to a medical or psychiatric examination or other assessment directed by the Court;
- the child's wishes in respect of any matter relevant to the proceedings;
- the appropriate forum for the proceedings; on the appropriate timing of the proceedings;
- the options available to the Court in respect of the child and the suitability of each such option including what order should be made in determining the application; and
- any other matter on which the Court seeks advice or on which the Children's Guardian considers that the Court should be informed.

Unless the Court directs otherwise, the Children's Guardian must file a written report advising on the interests of the child in accordance with the timetable set by the Court; and notify the Court of any person who should be joined as a party to proceedings in order to safeguard the child's interests.

[346] *Agreement between the President of the Family Division, Ministry of Justice, HMCS, Department for Children, Schools and Families and Cafcass*, 30 July 2009, http://www.familylaw.co.uk/images/Teasers/Interim%20Guidance%20for%20England%20-%2030%20July%202009.pdf

The Guardian must serve and accept service of documents on behalf of the child and, where the child has sufficient understanding, advise him of the contents of any document so served. If they are relevant to the determination of proceedings the Guardian must make the Court aware of the documents.

The Children's Guardian must relate the decision made by the Court to the child if the Guardian considers it appropriate to the child's age and understanding and in a manner appropriate to that child's age and understanding.

11.1.5. Children's solicitors

An alternative to representation by a Children's Guardian – or if CAFCASS is unable to provide one – is for your child to be represented by his own solicitor, independently of the parents. If the Court refuses leave it must give its reasons; if the child is a party to proceedings and is instructing his own solicitor who considers the child has sufficient understanding to give instructions then under Rule 16.6(3) a Guardian will not be necessary (and your child will be better off without involvement by CAFCASS). If there is already a Guardian the child may apply for them to be removed.

If, as will be increasingly likely, you cannot get legal aid but don't feel able to represent yourself and still want the advice and expertise of a solicitor, having separate representation for your child is a sensible option, and should be funded through legal aid. Contact the Law Society for details of a suitable solicitor in your area.

A child should be made a party to the proceedings only in the minority of cases which involve an issue of significant difficulty. Consideration should first be given to alternatives, such as further work by CAFCASS, a referral to social services or by engaging an expert. The Court may also consider whether to transfer the case to another court. The final decision is the Court's, and it will be influenced by the following factors:

- There has been a recommendation by CAFCASS;
- The child's interests cannot be represented by the adult parties;
- There is an intractable residence or contact dispute; contact has entirely ceased; there is implacable hostility to contact; the child is at risk of harm;
- The views and wishes of the child cannot adequately be met by a report to the Court;
- An older child is opposing a proposed course of action;
- There are unusually complex issues to be determined regarding medical or mental health or another matter;
- There are international complications involving child abduction, where it may be necessary for there to be discussions with overseas authorities or a foreign court;
- There are serious allegations of physical, sexual or other abuse or allegations of domestic violence beyond CAFCASS to resolve;

- The proceedings involve more than one child and their interests conflict;

- There is a contested issue about scientific testing.

An application for the appointment of a Children's Guardian or leave to have his own solicitor must include this evidence and be made according to **Part 18** of the Family Procedure Rules 2010. The application must be served to the other parties in the proceedings and to any other person as the Court may direct.

If a solicitor instructed by a Children's Guardian considers that the child is of sufficient maturity and understanding to instruct the solicitor, and the child's instructions are at odds with those from the Guardian, the solicitor must take the child's instructions and not the Guardian's (Family Procedure Rules 2010 **Rule 16.29(2)**). If he receives no instructions he must act in the best interests of the child.

Separate representation will result in additional delay, but may be the only route to resolution; the Court must weigh these factors while being guided by the child's best interest.

If the judge does not agree you must appeal. Bear in mind that separate representation can be used either by the Court or by the other side as a strategy to delay proceedings. Only the Court can order the direct involvement in proceedings of your children. Prior to 15th April 2008 this could only be ordered by a Circuit Judge; since then any judge has been able to make the order.

11.1.5.1. Legal precedent

As a precedent use **Mabon v Mabon [2005] EWCA Civ 634** in which Thorpe LJ considered Article 12 of the United Nations Convention on the Rights of Children, Article 8 of the European Convention on Human Rights and Rule 9.2A(4) of the Family Proceedings Rules 1991 (now superseded by the 2010 Rules) and directed that three mature and articulate teenagers had a right to separate representation; that their guardian might adequately represent their best interests but not their wishes.

The lower court, he said, had been wrong to refuse leave to the three oldest children aged 17, 15 and 13 to represent themselves independently, on the grounds that it would introduce delay, and that there was a risk of 'unquantifiable emotional damage from contact with the material in the case, and exposure to the harshness of the litigation process'. The conventional 'tandem model' of representation by a guardian, who instructs a solicitor, who in turn instructs a barrister, was 'paternalistic', and in conflict with the children's right to freedom of expression and participation.

11.1.6. Litigation Friends

If a child is party to proceedings but not the subject of those proceedings the Court must appoint a 'litigation friend' to represent him unless he has the Court's permission not to be represented or he has a solicitor and has sufficient understanding to instruct him. A litigation friend may be a CAFCASS officer, the Official Solicitor or

someone who 'can fairly and competently conduct proceedings on behalf of the child', 'has no interest adverse to that of the child', and 'undertakes to pay any costs which the child may be ordered to pay in relation to the proceedings, subject to any right that person may have to be repaid from the assets of the child'. Such a person must file a certificate of suitability with the Court and provide evidence.

11.1.7. Case study

Phillippa is a perfect example of a child who has spent her entire life in the family courts. Her first encounter with a CAFCASS officer came when she was only 18 months old.

Over a period of 8 years Phillippa was represented by no fewer than 7 different CAFCASS officers, 2 solicitors and 1 NYAS guardian. Every single one of these people took a different position on her case, causing it to drag on for years, and every single one of them insisted on talking to Phillippa as if she had never spoken to anyone before. This was also one of the problems encountered in Re S, a case we shall examine in **Chapter 11**.

Such inconsistency hardly demonstrates to the child that her welfare is being taken seriously through offering stability and consistency of reporting.

Aged 5, Phillippa was offered the CAFCASS colouring book but she was simply not interested in completing it. It did nothing to engage her interest and she could not see the point of it. Regardless of this, a persistent CAFCASS officer, failing to realise that Phillippa was not interested, stood over her demanding she complete the book. When she failed to do so, the book was brought out again 3 months later when the officer saw Phillippa with her father and a second attempt was made to complete the book from start to finish.

A basic understanding of children of this age would have established that with the best will in the world, outside of school it is very unlikely they are going to have the interest to complete a work book with detailed pictures and talk about it at great length. With CAFCASS it is a case of one size must fit all.

Over the following years Phillippa endured repeated visits from CAFCASS and NYAS, but not once did the format of these visits evolve as Phillippa developed and grew up and at no point did Phillippa ever feel or believe that the people who kept coming to see her were actually listening to her or putting across her views.

Probably the most dreadful encounter was when a solicitor, who had been appointed by a CAFCASS Guardian to represent Phillippa, decided, without running the idea past Mum first, to use Playmobil figures to explain to the child what went on in the courtroom. It was not the use of Playmobil itself which was insulting, but the whole manner in which this charade was carried out. It looked like someone had gone to the CAFCASS playroom and grabbed the first thing they could lay their hands on. There were even cats and dogs in the courtroom scene as there were not enough people. To top it all, the judge's character was a child in a wheelchair with her leg in plaster. When the solicitor arranged the characters in the so-called court scene she sat her own character between Mum and Dad, informing the child that this was 'so that they would not argue'. Phillippa was 8-

years-old and just looked at the solicitor in disbelief. She had not played with Playmobil for years and had been described in several previous CAFCASS reports as 'very mature' for her age.

What this child would have benefited from was an actual trip to a courtroom, where she would have been shown around, introduced to a real judge, allowed to play with the microphones and to try on some wigs and gowns and to ask any questions she wanted of her advocate and of the judge: an experience which would have de-mystified things for her.

The other problem which ran alongside this long and protracted case was that Phillippa was never offered any emotional support or anyone to talk to about the matters that were concerning her. The CAFCASS officers were only interested in writing their reports and moving on, they were not interested in the child. When one CAFCASS officer was asked directly what could be the effects of this case on Phillippa as a teenager and what could be done to help her, the officer's reply was, 'I don't care, as I will be retired by then'.

In the end Phillippa's mother found a counsellor who was prepared to work with a young child and subsequently a solicitor who was experienced in working with children and took instruction directly from her without reference to her parents. For the next 5 years Phillippa had someone outside of her family unit with whom to talk freely and to work to ensure that she understood what had been going on and that she could make her voice heard to her parents.

11.2. Interviewing children

During the course of a case it may be necessary for your children to be interviewed by CAFCASS, social services, medical practitioners, psychologists, the police or occasionally the judge.

These interviews are an ideal opportunity for an alienating parent to groom their child to give the responses they want, to tell the interviewer, for example, that you have been abusing them. An alienating parent may well try to be present at the interview and to influence the child, correcting 'errors' and preventing the child from saying anything the parent doesn't want them to say. Another ploy is to give the child a 'crib sheet' to take into the interview with him; perhaps containing drawings or diagrams of alleged incidents.

You might think that this should fall under the heading of 'Attempting to Pervert the Course of Justice', but the agencies likely to interview your child are notoriously lax, and some of them do not accept concepts like Parental Alienation. Social services in particular (and especially in Scotland) tend to ignore the guidance available and interview children in wholly improper ways.

It is vitally important that where there are allegations of physical or sexual abuse children are properly interviewed; these interviews may affect whether your child has contact you with again, is properly protected from an abusive parent, or whether criminal proceedings are brought against you. In 1992 guidance on interviews was

introduced, [347] which was updated in 2002 by the Home Office document *Achieving Best Evidence*[348] which applies to the interviewing of all children under the age of 17. Children are categorised in this document as 'very young': up to 5; 'young': between 5 and 11; and 'older': between 11 and 17.

Anyone familiar with some of the terrible witch-hunts in recent British history – the Cleveland Child Sexual Abuse Scandal, or the satanic ritual abuse investigations in Rochdale, Orkney, Broxtowe and Lewis, for example (discussed in *Family Justice on Trial*) – will appreciate how tempting it is for some interviewers to beguile children with leading questions, or to diagnose abuse based on bogus medical theories. Sadly, as Lord Justice Holman reflected recently, the important lessons of the Cleveland Inquiry 'have gone unheeded by doctors, social workers and the courts'. [349]

A correctly executed interview must be 'phased': Phase 1 involves establishing a rapport with the child and setting out ground rules; Phase 2 allows the child to give a narrative account in his own words; the interviewer can ask clarifying questions in Phase 3; and closes the interview in Phase 4.

[347] *Memorandum of Good Practice on Video Recorded Interviews for Child Witnesses for Criminal Proceedings*, Home Office 1992

[348] *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses Including Children*, Home Office, 2002, http://www.homeoffice.gov.uk/documents/achieving-best-evidence/guidance-witnesses.pdf?view=Binary

[349] Steve Doughty, *Judge attacks social workers who took 'abused' girl, ten, away from parents for no reason*, The Daily Mail, 06 May 2008, http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=564174&in_page_id=1770

Some of the main principles are given below, but you should read *Achieving Best Evidence* in its entirety if your child is about to be interviewed or if you suspect that an interview has not been conducted appropriately.

Phase 1 – Establishing a Rapport

- The aim is to obtain an accurate and truthful account in a way which is fair, in the child's interests and acceptable to the Court.
- The interviewer should establish a rapport with the child and explain the need for a truthful and accurate account.
- He should ensure the witness leaves the interview feeling they have been given the fullest opportunity to be heard.
- He should elicit evidence from the witness in a way which is compatible with what is known about the way human memory operates and the way it develops through childhood.
- If the interview is to be videotaped, one interviewer should be responsible for the interview, with a second interviewer present, inside the room or outside, to monitor and support.
- The interviewer must introduce himself and anyone else present to the child, explain the purpose of the interview, give the time and location for the benefit of the recording, and point out to the child the location of cameras, etc.

- The pace of the interview must be dictated by the age and ability of the child. The child's attention span must not be exceeded and breaks must be allowed, especially if the child becomes distressed. Information received reluctantly will not be accepted by the courts.

- If the child leaves to go to the lavatory he should be accompanied and be discouraged from speaking to others – any interaction with others must be documented.

- Breaks and refreshments must neither be withheld to elicit cooperation nor offered as a reward.

Phase 2 – Developing the Narrative

- The child should be encouraged to give evidence spontaneously and with a minimum of prompting; the interviewer may raise an earlier complaint or allegation, but not its substance – it is the child's memory of any incident which is important, and not the complaint itself. The guidance warns, 'on no account must the explicit allegation be raised directly with the child: it may jeopardise any legal proceedings and might lead to a false allegation'.

- The interviewer should aim for a free narrative account in the child's own words, and act as a facilitator, not as an interrogator.

- The interviewer may call the child by his first name but not use terms of endearment, or offer verbal reinforcement, and should avoid physical contact. He must remain neutral and communicate neither approval nor disapproval.

- Where evidence is inconsistent or the interviewer suspects allegations to be false he should first allow the child to finish his account before investigating these issues more closely – the interviewer should only appear puzzled, and never imply the child is lying.

Phase 3 – Clarifying Questions

- The interviewer should ask only one question at a time and allow the child to answer at his own pace.

- Questions should be kept short and simple.

- Where vocabulary is uncertain, for example regarding sexual anatomy, a doll or picture may be used.

- Questions should ideally be 'open-ended', enabling the child to expand on his answers.

- Specific questions should be of the Who, What, Where, When variety – Why questions should be used cautiously.

- Leading questions – those which assume knowledge of the answer – should be avoided, and can lead to the whole recording being ruled inadmissible.

- Research has indicated that the responses to leading questions tend to be determined more by the manner of questioning than by what is accurately remembered. Leading questions can serve not merely to influence the child's answer, but may also significantly distort the child's memory in the direction implied by the leading question.

Phase 4 – Closing the Interview

- The interviewer closes the interview by summarising to the child in his own language the evidence given, answering any questions the child may have, and thanking the child for his time and effort.

- The interviewer should also check with his colleagues who may have been listening whether they have further questions.

An interview which is not conducted according to the principles laid down in *Achieving Best Evidence* should not be accepted by a court as evidence, and you must fight to have such evidence removed from the record.

11.3. Parental Alienation

Hating or rejecting a parent is not something that comes naturally to a child. It has to be learned. A person who would teach a child to hate their parent represents a grave and persistent danger to the mental and emotional health of that child.

The Honourable Judge Gomery of Canada

11.3.1. Richard Gardner

The term Parental Alienation Syndrome (PAS) was coined by US psychiatrist Dr Richard Gardner in the early 1980s to describe the poisoning of a child's mind by one parent against the other. It is also referred to as Parental Alienation Disorder (PAD). Opponents of the use of PAS in family cases claim variously that PAS has been discredited and debunked by the American Psychological Association (APA); but a spokesperson for the APA, Executive Director of Public and Member Communications Rhea K Farberman, refutes these claims and states that the Association has no official position on the issue.

Opponents also point out that PAS is not included in the APA's definitive publication DSM-IV (the Diagnostic and Statistical Manual of mental disorders, 1994, revised 2000) and is therefore not accepted by professionals; in fact it was too new a theory to be included in DSM-IV but a group of 50 mental health experts from 10

countries is now campaigning[350] to have it included in DSM-V, to be published in May 2012.[351] Inclusion in the DSM can take a long time, Asperger's syndrome, for example, was described in 1944 but only added in 1994; Tourette's was described in 1885 but only made it to the DSM in 1980. On inclusion 'syndromes' tend to be re-classified as 'disorders'.

The term has also been rejected by some campaigners on the tenuous grounds that Gardner promoted paedophilia, or was even a paedophile himself. There's no evidence for this, and the allegation seems only to be made by those who reject his theory, but it is true he expressed a tolerance of paedophilia at odds with much scientific research into child abuse and which has sometimes benefited those accused of molesting children more than the children themselves. Gardner considered that society's reaction to paedophilia was overly hysterical.

He does make an important point, though: a child who has technically been abused need not necessarily also have been severely traumatised if the abuse was without violence and if the child was too young fully to understand what happened; it is then possible to traumatise the child through the scandalised and often hysterical over-reactions of adults.

Gardner's argument is that the trauma caused a child by an incident of abuse derives from both the abuse and the reaction of other adults to it: clearly it is vital that parents and well-meaning professionals do not end up making matters worse. This line of reasoning is emphatically *not* a justification for abuse.

Gardner also maintained that paedophilia 'like all other forms of atypical sexuality is part of the human repertoire'. Those who don't read Gardner very thoroughly misconstrue this as acceptance or approval, which was far from his intention, 'My acknowledgment that a form of behavior is part of the human potential is not an endorsement of that behavior. Rape, murder, sexual sadism, and sexual harassment are all part of the human potential. This does not mean we sanction these abominations.'[352]

Gardner is a controversial figure and many people reject outright the very concept of alienation; dismissing the theory along with the man, however, would be to throw out the baby with the bathwater, and has encouraged those who would deny contact to accuse desperate fathers of paedophilia if they try to use Gardner's theories in their defence. These fathers are guilty only of picking the wrong saviour, an easy error when so few are prepared to speak up for the falsely accused.

Since Gardner's death a great many other experts have acknowledged and researched the phenomenon of PAS.

[350] Lindsay Lyon, *Parental alienation: a mental diagnosis?*, US News, 29 October 2009, http://health.usnews.com/articles/health/childrens-health/2009/10/29/parental-alienation-a-mental-diagnosis_print.htm

[351] Les Veskma, *The Revision of DSM: What's the Status of Parental Alienation Syndrome?*, http://mensnewsdaily.com/glennsacks/2009/02/15/dsm-v-parental-alienation-syndrome/

[352] Richard A Gardner, *Misperceptions versus facts about Richard A. Gardner, M.D.*, June 1999, http://www.fact.on.ca/info/pas/misperce.htm

11.3.2. Alienating children

It should readily be evident to anyone that a resident parent has the opportunity and motive to turn a child against the non-resident parent and that PAS merely describes the behaviours of children who have been poisoned or alienated through constant denigration by one parent against the other in a manner all too common in contact disputes.

A non-resident parent can also alienate a child against the resident parent, though they will have less opportunity and will accordingly be less effective.
It is also plain that the social services will alienate a child against its parents in order to make it easier to take the child away or place it for adoption.

Where alienators are cunning is that once alienation has become successful and the child says he no longer wants to see the non-resident parent the alienating parent then becomes outwardly supportive of contact, but says they have to respect the child's wishes not to have contact.

Those who deny that parental alienation exists must also believe that a child simply cannot be alienated from a loving parent, so how *do* parents alienate a child against the other parent? Parental alienation expert Dr Amy Baker PhD is the only researcher to have conducted studies of adults who were alienated as children; she explains how parental alienation is achieved;[353]

- Bad-mouthing. This is the dominant and most effective strategy, and usually involves allegations that the parent is unsafe, unloving and unavailable (note how these tie in with popular cultural representations of fathers as violent, emotionless and uncommitted).

- Presenting the alienated parent as dangerous, abusive or plotting abduction, etc.

- The progressive reduction and disruption of contact, and its eventual elimination.

- The treatment of the child who visits the alienated parent as a traitor, and the subsequent withdrawal of love or parental services such as food.

- The message that because the father left the marriage (he probably didn't go willingly): 'he doesn't love us'.

- Forcing the child to choose between his parents and families: 'how could you visit those awful people who don't like me?'

- Confiding in the child – and discussing adult issues with which the child should not be burdened.

[353] Amy Baker, *Adult children of parental alienation syndrome: Breaking the ties that bind*, W W Norton, April 2007, http://www.amyjlbaker.com/index.php

- Forbidding any mention of the alienated parent or any photos of him or her – and punishing the child if he does not conform.

- Writing scripts and enacting out scenarios which malign the alienated parent (weird but true).

- Adopting the techniques of cult leaders to manipulate and brainwash. The cult analogy also helps children or adults who have been alienated with their recovery; the effects are very similar.

Parental alienation does not need to be overt; merely expressing anxiety each time a child visits the other parent and relief each time he returns is a form of alienation, and over time becomes effective.

Since the 1989 Children Act PAS has become an effective strategy for gaining custody, because the Act demands that courts take greater account of the child's expressed wishes. This is a policy which appears to make a great deal of sense, and forms the basis of the CAFCASS *Wishes and Feelings* assessment,[354] but in practice it can be dangerous to the child if the investigating officer is not familiar with or rejects the concept of PAS.

In PAS cases the 'child's wishes' are not in fact his own but are those of the alienating parent. A parent who prevents contact can avoid the charge of contempt by maintaining that the child does not wish to see the other parent; a CAFCASS officer will then investigate and confirm this, the Court will take the child's 'wishes' into consideration and stop contact. Contact may well not resume again, if at all, until the child is old enough to make decisions independently of the alienating parent.

Inevitably allegations of PAS are also used against innocent parents trying to protect their children from abusive parents seeking contact. This is obviously another scenario in which the reluctance of the courts to distinguish between abusive and protective parents is potentially catastrophic.

Some academics, such as the parental alienation expert Dr Ludwig Lowenstein, have discussed the merits of comparing parental alienation with Stockholm Syndrome,[355] Illustrating the well-known case of Natascha Kampusch Lowenstein says,

> *A combination of fear, indoctrination and 'learned helplessness', promoted the total loyalty and obedience of the child to her captor. This captor was no longer viewed, as was the case initially, as evil but as necessary to the child's well-being and her survival. A similar scenario occurs in the case of children who are alienated against an absent parent.*

He explains further,

> *the captor wished to totally alienate or eliminate the child's loyalty or any feeling towards her natural parents. Due to the long period away from her parents and a total dependence for survival on her captor, Natascha's closeness to her family gradually faded. She may even have felt that her own parents*

[354] http://www.cafcass.gov.uk/publications/my_needs,_wishes_and_feelings.aspx

[355] Lowenstein, L. F., *The comparison of parental alienation to the 'Stockholm syndrome'*, 2006, http://www.parental-alienation.info/publications/46-thecomofparalitothestosyn.htm

> *were making little or no effort to find her and rescue her. This view may also have been inculcated by her captor… The same scenario occurs in the case of parental alienation where the power of the dominant custodial parent programmes the child/children to eschew or marginalise the absent parent. That absent parent no longer appears to be important and is even likely to be viewed as damaging to the child's survival.*

Because it isn't yet officially recognised you need to be quite careful when referring to Parental Alienation Syndrome in Court. Other expressions such as 'brainwashing', 'poisoning' or 'programming' may be safer. You can also refer to implacable hostility quite safely. You do not want to get bogged down in irrelevant discussions of whether or not PAS technically qualifies as a syndrome; however, there is absolutely no doubt that parental alienation exists and it is recognised in the European court of Human Rights and in other jurisdictions. The ECHR takes precedence over other national jurisdictions.

The damage to relationships caused by alienation is clear and often a feature of cases. In **Re W (A Child) [2008] EWCA Civ 1181** Lord Justice Wall quoted extensively from the report by the consultant child and adolescent psychiatrist, Dr Kirk Weir (note that fathers are just as likely to alienate as mothers),

> *Even the most neutral question became an opportunity for a torrent of vilification against the father. The interviews had an "orchestrated" feel; a sense that all knew this was an opportunity to leave me in no doubt as to their feelings. All were supporting each other and there was not a chink between them. That a child of 11 should feel it acceptable to say (without comment from his mother or siblings) that he wished his father dead says a great deal about the atmosphere which the mother has allowed to develop. The family dynamic was obvious. The alliance against the father would be difficult for an individual to break, particularly the youngest. It was difficult to believe the mother was promoting contact with the father. It was clear she loathed him and regarded him as an emotional danger to her children.*

Only through parents repeatedly citing parental alienation in their cases will it eventually become accepted; use all the peer-reviewed research you can find. If your child is showing evidence of alienation call it that, calling it something else is dishonest and you will end up on the side of those who deny it.

If the judge does not accept the use of alienation, persevere or appeal. Judges have no training in child psychology (that's why CAFCASS exists), so if alienation is a factor in your case ask for an expert independent psychologist to report on your child's symptoms in the same way that you would for domestic violence; you will then have PAS automatically mentioned in your case.

It is important to get the Court to order contact where there is alienation. A child will often allow himself to relax and enjoy contact if it has been ordered by a judge and is therefore unavoidable whereas if the contact had not been ordered he would have continued to please the alienating parent.

11.3.3. Recognising alienation

Dr Amy Baker identifies eight indicators of parental alienation syndrome; these are the things you need to look out for if you believe your child has been alienated:

1. Your child is denigrating a decent, non-abusive parent; you have done nothing to justify your child's attitude towards you (where there is abuse the diagnosis of alienation cannot be made).

2. Your child makes frivolous and absurd rationalisations for not wanting contact, and cannot provide any good reason for not wishing to see you. If there is contact your child relaxes and enjoys this, but then expresses hostility towards you when back with the alienating parent.

3. There is a lack of ambivalence towards the alienating parent: your child is entirely uncritical of the other parent, shows disproportionate affection and is very clingy and dependent on the alienating parent.

4. Your child asserts – perhaps through letters or phone calls – that his decision to reject you is his own.

5. Your child has a complete absence of guilt about his treatment of you, and even relishes it. As Dr Baker puts it, his very soul seems to have been corrupted.

6. Your child reflexively and automatically rejects everything you say and is evasive in talking about you; he seems to fear that you might persuade him he is wrong in his rejection of you and blocks out anything that threatens his position.

7. Your child 'borrows scenarios' from the alienating parent, for example, alleging incidents which did not happen. He is also using words, and writing letters, beyond his ability and vocabulary, and using adult phraseology. He uses rigid and unnatural formulae in talking about you.

8. Finally, his rejection extends to your entire extended family, and perhaps to friends and other people, as if you all had some terrible virus.

The behaviour of the alienating parent is also distinctive: he or she will be controlling, will stay close to the child and won't allow him or her to be interviewed alone. The alienating parent will claim to support contact with you, and that it is the child himself who does not want it.

Note: that alienation is not only a form of child abuse, it is also associated with other forms of abuse including physical and sexual abuse of a child. It needs to be taken very, very seriously.

11.3.4. The courts & alienation

The courts' approach to PAS has been dominated by the 2000 report [356] by child psychiatrists Sturge and Glaser which was commissioned to help resolve four cases in the Court of Appeal and which we discussed in the previous chapter.

The authors were only asked to report on the domestic violence alleged to have been perpetrated by the fathers in the four cases, and their references to PAS are sketchy and of limited value. Nevertheless, this report, in which the authors bluntly state 'Parental Alienation Syndrome does not exist', has become very influential on subsequent cases and has been regarded as providing a definitive position on PAS as well as on domestic violence.

The psychologist Tony Hobbs warned that the review of literature on PAS in the Sturge and Glaser report was 'seriously flawed',[357] despite its implication in up to 90% of protracted cases,

> *While Sturge and Glaser have acknowledged the reality of so many of the factors involved in PAS, unlike many other practitioners around the world they have held back from identifying this constellation of factors as comprising an identifiable syndrome. This is not helpful. When an entity is identified and named, it can then begin to be effectively addressed.*

There have been some recent cases, for example where residence has been transferred, where the courts have referred to the need to protect a child from a parent's alienation, indicating at least a degree of recognition of the issue, and perhaps a gradual change in attitude. Consider Judge Bond's conclusion in **Re R (A Child) [2009] EWHC B38 (Fam)**,

> *I also find that the mother's process of alienating R from his father began a long time ago.*

In **Re T (A Child) [2002] EWCA Civ 1736** there is an instructive discussion of alienation in a case in which a child had become alienated from his father. The conclusion was that the father was largely responsible for this – he was an alcoholic and drug abuser – but that the mother had also contributed to the child's anxiety by overstating the father's problems and through encouraging the boy to reject his father's homosexuality. The boy was found to be using words beyond his age.

It is essential that you demonstrate to the Court that the child's alienation from you is due to brainwashing by the other parent and is not justified by your behaviour. You must be able to see through your child's eyes, and understand how he views contact with you. Re T reveals a case in which alienation is not clear-cut. The classic case in which a court accepts the indisputable alienation of a parent is Bracewell's treatment of **V v V [2004] EWHC 1215 (Fam)** in which she transferred residence to the father,

[356] C. Sturge & D. Glaser, *Contact and Domestic Violence – The Experts' court Report*, Fam. Law 615, 2000
[357] Tony Hobbs, *Parental Alienation Syndrome and UK Family Courts*, Fam. Law, 2002, http://www.keele.ac.uk/depts/la/documents/thobbsPASandukFC-Pt1.pdf

Wherever there is conflict in the versions given by father and mother, I have no hesitation in preferring the evidence of father. I found him sensitive to the needs of the children, caring, truthful, and... wanting to put his children first, but he has been thwarted by the mother.

I find the mother has little or no credibility. She has an agenda in this case to pretend to support contact, but in reality wants to undermine it by coaching the children to make allegations, by inventing or grossly exaggerating minor incidents in order to justify stopping contact.

Mother is shrewd and intelligent, but twisted by an agenda of her own. She does not want to lose residence, nor does she want to go to prison for failure to comply, but she wants to eliminate contact. Therefore, she has to present herself as a parent who supports contact, but who is constrained by the need to protect the children from harm. The truth, however, is that she builds up her store of ammunition against father to use when the opportunity presents.

Let's look now at how the courts deal with parental alienation by presenting the particularly extreme case of Re S and then offering some thoughts upon it. S's parents separated before he was born but his father managed to establish and maintain contact from when his son was a toddler until shortly before his 8th birthday. Contact then broke down for 4 years during which time family therapy was ordered. On 4th January 2010 when S was 11 Judge Bellamy ordered transfer of residence to the father he was now said to hate, and with his step-mother and younger half-brothers (**Re S (A Child) [2010] EWHC 192**). His mother declared that she supported contact, but obstructed all attempts to enable it; litigation had continued for 10 years.

The mother appealed against the decision and on 21st January her appeal was dismissed (**Re S (A Child) [2010] EWCA Civ 219**). By this time S had a new Children's Guardian and solicitor and the local authority had become involved. Lord Justice Thorpe said that although the boy's opposition to transfer 'deserved respect', and that the boy would suffer 'significant distress' in the short term, he would suffer emotional harm if the mother's alienation continued.

In March with the case before him for the 8th time, Bellamy ordered the mother to take S to his father's house; if she refused the Court Tipstaff would be engaged (**Re S (A Child) [2010] EWHC B2**); this was an effort to get the original 4th January order implemented. The child's guardian appealed and the appeal was allowed (**Re S (A Child) [2010] EWCA Civ 325**); the severely alienated child was threatening to run away or go on hunger strike if forced to live with his father; lawyers claimed that forcibly removing S from his mother would breach his human rights. Following a request by the mother's lawyer, Lorna Meyer, QC, the Court ruled that the boy be placed in interim foster care for 21 days to acclimatise to being removed from his mother, during which time he would have direct contact with his father and only indirect contact by phone with his mother.

S refused to cooperate, and the social worker involved became 'most concerned for his emotional and mental health', advising the father that no further good could come with S remaining in foster care.' A consultant child psychotherapist reported,

> *S is an extremely distressed and unhappy little boy who shows numerous clinical symptoms of a depressive illness…* [If] *the current external situation regarding court and contact remain unchanged there is a high risk that S will begin to act upon these ideas of self-harm. He is experiencing feelings of despair and hopelessness, worthlessness, and cannot see any hope for the future… All of these would point to an eligibility for a diagnosis of clinical depression.*

Accordingly the father agreed on 25th March that S should return to his mother under an interim Care Order. Further attempts at contact failed.

On 13th July the despairing father withdrew his application for residence made on 4th January. On the 21st July the parents agreed that residence would remain with the mother under a supervision order for a year, with the father to have only indirect 'contact' through school reports and photographs. A Section 91(14) order prevented further applications until the child was sixteen.

The case came to an end on 11th August with a judgement (**Warwickshire County Council v TE & Ors [2010] EWHC B19**) which his Honour Judge Clifford Bellamy began by paraphrasing Munby's well-known words made six wasted years earlier in Re D (Intractable Contact Dispute: Publicity) [2004] 1 FLR 1226,

> *On 21 July 2010 a wholly deserving father left my court in tears having been driven to abandon his battle to implement an order which I had made on 4th January 2010 that his son, S, now aged 12, should move to live with him.*

Bellamy describes the course of the case and the intervention provided by Karen Woodall of the Centre for Separated Families to overcome the parental alienation, based on an approach developed by Johnston, Walters and Friedlander in 2001. After 5 sessions with S she reported 'small but significant signs of progress'. Expert witness Dr Weir, a child and adolescent psychiatrist, disagreed: 'it has been and remains my opinion that therapy is unlikely to succeed in overcoming S's resistance to any form of relationship with his father's family'.

Dr Weir believed that the therapeutic approach could not overcome the child's resistance to seeing his father, and was actually making the situation worse,

> *The difficulty I have is that although the local authority is hoping reason will prevail and S will come round to accepting the inevitable, I think it is unlikely. The delay allows a period when attitudes can become entrenched, behaving badly, and further risk of harm occurring… at the end after the work and negotiation there will still be the same situation where we have to force him to live with his father.*

He preferred a more robust approach,

> *The* [first] *visit needs to be quite long to help the child get over it. If it ends quickly because of unpleasantness then it is setting up the next visit to fail. I am looking at the first visit being very long and to be kept going until S is prepared to answer his father and… look him in the eye ending in a change of attitude. It may take hours… Indications from other cases*

are that threats are not persisted with. They may end in hours or 2/3 days and then things change… and it is OK.

The social worker involved in the case rejected the concept of alienation (in accordance with the Sturge/Glaser report) and thus opposed this solution; instead she referred S to the Child and Adolescent Mental Health Service (CAMHS) which concluded that S was potentially suicidal. It is easy to understand, given S's delicate mental state, why his father decided to withdraw his application (his wife had also recently miscarried).

In his reflections on the case Clifford Bellamy accepted the concept of alienation, but acknowledged that there was no consensus on how to deal with it effectively; he repeated the local authority's view that Dr Weir was 'an evangelist for the concept of alienation', and warned of the 'over-dogmatic expert'. Kirk Weir had shown his tendency to embrace fashionable causes when he fell for the satanic ritual abuse falsehood in the 1980s. Bellamy outlined the options for achieving transfer of residence:

- Lorna Meyer's 'stepping stone' approach, using an interim Care Order under Section 37 to provide an initial period in foster care – Dr Weir warned that this would make matters worse, and so it proved;

- The therapeutic approach, advocated by Karen Woodall – again this failed, due partly to the therapists' lack of relevant experience; the therapy use by Woodall was highly intensive and distressing to S and resulted in only a 'tiny' advance;

- Use of the Court Tipstaff, advocated by Dr Weir – this was presented as highly questionable and a breach of S's Article 5 rights, a claim the Court of Appeal never ruled on.

Bellamy concluded that there simply isn't sufficient evidence available to determine the best approach, and that no expert has the necessary experience: in the case of S, the system failed. This has been our criticism all along: Family Court decisions are made against a background of near total ignorance; the outcomes for the children affected are neither monitored nor recorded, and so judges lack the evidence they need on which to base their judgements.

Bellamy added a postscript recording that S had intimated that 'this was not the end and he would think about seeing his father after his GCSE's.'

The fundamental problem in Re S was that no one involved in the case – judge, parents, lawyers, Children's Guardian, social workers, local authority and child experts – agreed about what should happen to S or how it should happen. They didn't even agree that parental alienation exists or that S was a victim.

Incredibly the two therapists instructed to restore contact 'had no experience of working with families in high conflict cases or, more importantly, of working with alienated children'. The therapy failed. Equally unhelpfully the social worker admitted, 'despite my 21 years of experience in social care, high conflict cases and child protection, prior to this case, I did not have any previous experience in alienation'. That is an astonishing confession.

As we have shown, the two experts involved, Karen Woodall and Dr Weir, agreed that S was alienated but had very different approaches to dealing with an alienated child. The local authority seems to have accepted neither 'the concept of alienation' nor 'Dr Weir's assessment that S was alienated from his father'; it did not support the transfer of residence.

This failure to agree meant that the transfer of residence to the father recommended by Dr Weir did not happen and the alienation became more entrenched as S became correspondingly more distressed. The impasse reached was thus as much between the various experts and other professionals paralysed by trade disagreements as it was between the parents. Unable to agree they simply gave up. It is bewildering that a profession so critical to children's lives should be staffed by people of such outstanding ignorance.

The failure of the UK courts routinely to recognise PAS is not repeated in other jurisdictions. In Coursey v Coursey, for example, conducted at Sutter County Superior Court, California on 18th August 1987 the court found a clear case of parental alienation, fined the mother $500 and made a committal order for 5 days suspended on condition she complied with the order for contact. In the Florida case of Schultz v Schultz on 9th February 1988 the court made reference to parental alienation syndrome and the inculcation of the children's alienation by the mother, and threatened contempt, imprisonment, loss of residential custody, or any combination thereof if the mother did not comply with the Court's order to cease and desist from her 'slowly dripping poison into the minds of the children' rather than instil love and respect for the father. An appeal against the order failed.

If such a terrible outcome as occurred in Re S is to be avoided in future (assuming anyone wants to avoid it), it will be necessary for professionals to accept and understand alienation. Even if they lack experience they should not lack education. In more conflicted cases it is essential that the professionals involved should either have the requisite experience and expertise or defer to those who have.

One person only should then take responsibility for deciding the course of action to be taken and for following it through. Far from being rare, alienation in family disputes is very common and ranges from the low level and subtle to the very grave degree inflicted upon S; that it is misunderstood to the point of denial is a shocking indictment of the family justice system.

11.3.5. Coping with alienation

It is a ghastly thing if your child says he doesn't ever want to see you again, or accuses you of things you haven't done; here are some tips for dealing with this:

- If you still have contact with your child, accept his view of you: he has a right to that opinion. Listen to him. Understand his feelings.
- Don't engage in an argument or try to counter accusations – it will be a total waste of time. Let him know that he can hear your side of the story when he is ready to.
- Listen, but don't take what he says to heart: these are not his true feelings – he's just the messenger for the other parent; don't

comply when he asks you to stop trying to see him (adults who were child victims of alienation say they were devastated if the alienated parent took their rejection at face value).

- When you have contact, concentrate on happy, fun-filled activities; this is what he will remember when away from you.

- Whatever the allegations against you, show yourself to be as different from those as possible – be reliable, punctual, loving, available, etc.

- Don't shut down lines of communication or you will find it more difficult to reopen them later.

- If you have lost contact, understand that what your child says and does has come from the other parent, not from him. Don't blame him for it.

- Don't give up; continue to write and telephone and try to win contact. It won't always be like this.

- Whatever the alienating parent does, they are still your child's parent; respect that and don't let yourself do to them what they are doing to you.
- Be a paragon of virtue and fortitude – do not give the alienating parent any ammunition to use against you. The slightest slip will be used to reinforce the alienation, and your child will be justified in blaming you for that.

- Educate yourself about PAS. Those who deny it exists do not have the interests of your child at heart.

- Stay strong and positive; NEVER give up hope, NEVER give up on your child, many children will slowly awaken to the truth, many will try to find the alienated parent again.

11.4. Cases

Separate representation

G v G (Minors: Custody Appeal) [1985] 1 WLR 647
Gillick v West Norfolk and Wisbech Health Authority [1986] AC 112
Re D (A Minor) (Contact: Mother's Hostility) [1993] 2 FLR 1
S v Oxfordshire County Council [1993] 1 FLR 452
Re J (A Minor) (Contact) [1994] 1 FLR 729
Re P (A Minor) (Contact) [1994] 2 FLR 374
Re M (Family Proceedings: Affidavits) [1995] 2 FLR 100
Re W (Residence) [1999] 2 FLR 390
Re A (Contact: Separate Representation) [2001] 1 FLR 715
Re S (Contact) (Children's Views) [2002] EWHC 540 (Fam), 1 FLR 1156
A v A [2004] EWHC 142 (Fam)
Mabon v Mabon [2005] EWCA Civ 634, 2 FLR 1011
Re L (Care: Threshold Criteria) (Family Division 26 October 2006)
Re B (Children) [2008] UKHL 35
Re B (Contact: Appointment of Guardian) [2009] EWCA Civ 435

Alienation

Re T (A Child) [2002] EWCA Civ 1736
Re D (Intractable Contact Dispute: Publicity) [2004] EWHC 727 (Fam)
V v V [2004] EWHC 1215 (Fam)
Re W (A Child) [2008] EWCA Civ 1181
Re R (A Child) [2009] EWHC B38 (Fam)
Re S (A Child) [2010] EWHC 192
Re S (A Child) [2010] EWCA Civ 219
Re S (A Child) [2010] EWHC B2
Re S (A Child) [2010] EWCA Civ 325
Warwickshire County Council v TE & Ors [2010] EWHC B19

CHAPTER 12: OBSTACLES

> *The non-custodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.*
>
> Joseph Goldstein, Anna Freud and Albert Solnit[358]

12.1. Injunctions

There is a range of obstacles which an obstructive parent can ask the Court to throw into your path as you pursue your quest to be reunited with your children. These can cause delay and serious impediment if, for example, you are prevented from entering your own home.

An injunction or injunctive order is an order obliging a party to do something or prohibiting them from doing something. We shall look at Non-Molestation Orders, Occupation Orders, Go Orders and Barring Orders, but we shall start with allegations of harassment.

12.1.1. Harassment allegations

Claims of harassment are very common in family law proceedings and the legislation is widely abused. Harassment is defined in Section 154 of the Criminal Justice and Public Order Act 1994.

You are guilty of an offence if you intend to cause someone harassment, alarm or distress by,

[358] Joseph Goldstein, Anna Freud and Albert Solnit, *Beyond the best interests of the child,* 1973

a) using threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

b) displaying any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.

The offence may be committed in any private or public place, but if you are both inside the same dwelling no offence is committed.

Harassment itself is not defined, but the law says,

> *The person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.*

Harassment must be proved by a 'course of conduct', but under the Protection from Harassment Act 1997 [359] only two incidents are necessary to prove a 'course of conduct'. This means you can still be prosecuted if only two incidents out of a longer list of allegations can be proved, even if they are months apart. See Lau v DPP [2000] 1 FLR 799. Nevertheless, to prove a 'course of conduct' there must be cogent linking conduct between the events, and it is up to the prosecution to prove this. See R v Hills [2001] 1 FLR 580 in which a conviction was overturned.

[359] http://www.opsi.gov.uk/acts/acts1997/ukpga_19970040_en_1

A police constable may arrest you without warrant if he reasonably suspects you are committing an offence. You will then be liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

It is not harassment if both the perpetrator and the victim are inside the same building; it is a defence if the defendant was inside a building and didn't think that what he was doing would be seen outside the building. It is a defence if the course of conduct was pursued for the purpose of preventing or detecting crime, if it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or if the defendant thought the pursuit of the course of conduct reasonable.

It is also harassment under Section 4 of the Act if a 'reasonable person' would think that the course of conduct could cause another to fear that violence will be used against them. The defences are the same as above, or if the course of conduct was reasonable for the protection of the defendant or another or for the protection of his or another's property.

Again, a course of conduct is defined by only two incidents.

Sadly, it will not be a 'reasonable person' who judges you, but a trio of magistrates. If you are arrested for harassment, demand to see the duty solicitor at the police station and do not agree during the interview on any account that your behaviour could have been construed as harassment. The most common reason any reader of this e-Book is likely to be charged with harassment is that they were taking reasonable steps to sort out contact with a child.

State that as far as you are concerned your behaviour was perfectly reasonable, and you cannot imagine how it could have been interpreted otherwise. If you do agree, as you will be pressured to do, then in effect you will become the 'reasonable person' required to condemn you. If your action was in order to comply with a Court Order – for example, you were making a phone call to confirm contact arrangements – that is a legitimate defence, so use it.

It is common to offer a reduced sentence if you plead guilty, but you are strongly advised to resist this. If you admit guilt, the harassment charge will continue to affect all future applications.

Similarly, never, ever, ever accept a caution if you are innocent of harassment; it is an admission of guilt and will inevitably be used against you later, in a residence or contact dispute. The police may offer you a deal to accept the caution – don't fall for it. Don't ever accept a caution if you haven't committed the offence for which you are being cautioned.

You are also guilty of an offence if you send a message by letter, email or text, etc, which is indecent or grossly offensive, threatening or known to be false, if your intent is that it should cause distress or anxiety. You are not guilty if you can show that the message was intended to reinforce a demand you had reasonable grounds for making, or if you believe the message was a proper means to reinforce the demand. Such messages are covered under the Malicious Communications Act 1988.

12.1.2. Non-molestation orders

12.1.2.1. Applications

Non-molestation orders come under **Part IV** of the Family Law Act 1996 and the relevant rules of court are the Family Procedure Rules 2010, **Part 10**. They prohibit you from 'molesting' the applicant or another adult or a relevant child. 'Molest' can be interpreted generally or can refer to specific acts; in this context its meaning is closer to 'harassment'; the law provides no definition. Applications are made using **Form FL401** and must be supported by a witness statement.

In family proceedings, including emergency protection orders, the Court can make the order without application if it thinks it necessary. The order can endure of a specific period or until another order is made; in family proceedings it terminates when the proceedings do.

The Court must first establish that the accused is 'associated' with the applicant. If there is no 'association' the applicant can apply instead for a restraining order under the Protection from Harassment Act 1997.

The Court may also order disclosure of records from the police, social services or hospitals in order to provide confirmation.

The Court's consideration in making the order must be to 'secure the health, safety and well-being' of the applicant, other adult or child.

The Non-Molestation Order is a favourite tactic for the prevention of contact; these are usually used against fathers and depend again on the false feminist stereotype of domestic violence. The mother will typically have been granted sole residence, and this will often quickly be followed by a summons to a hearing for a Non-Molestation Order. Unlike harassment which requires a small degree of evidence, a Non-Molestation Order can be obtained merely by a mother claiming that her former partner *may* become violent or abusive.

12.1.2.2. Breach

If the Court grants the order it can add a 'power of arrest' to it, meaning that if you breach the order you can be arrested, even if you haven't committed a crime. 'Power of arrest' can be added even to an order made without notice, so you could be arrested without being aware you have breached an order, though you can't be convicted. Committal proceedings must be heard in open court.

The order itself is made by the Court entirely for the purpose of creating a crime which would not otherwise exist. What it prohibits is ordinarily not criminal behaviour; the order exists only to be violated, since only its violation, without reasonable excuse, is a criminal offence under the Domestic Violence, Crime and Victims Act 2004 – with a maximum penalty of 5 years in prison. The normal principles upon which law has always been based are turned on their head. If your conduct results in a conviction, however, that conduct cannot also be punished as a Contempt of Court. If it has already been punished as a Contempt of Court then you cannot be convicted of an offence. Although the intention of the Act was to increase the availability and hence application of Non-Molestation and Occupation Orders, the consequence seems to have been a fall in the demand, but the judiciary are looking at ways to get the numbers up again

If you are really the perpetrator of domestic violence there are laws which deal with that and will punish you accordingly; Non-Molestation Orders are designed *specifically* to be used by partners who have *not* been the victims of violence, against men who have *never* been accused, charged or convicted of violence. By making the breach of these orders a criminal offence, the non-molestation injunction has become a formidable weapon in the hands of an unscrupulous spouse.

Fathers who are merely trying to maintain contact with their children, and who may even have been acquitted of any wrongdoing in the criminal courts, are criminalised – often in their absence – and forcibly removed from their homes and their children. The father then becomes the only man in the world prohibited from having contact with his own children. The purpose of the Non-Molestation Order is not to prevent or to punish violence, but to remove fathers from their families and to ensure that child custody remains with the mother.

12.1.2.3. Ex parte applications

The application is usually made *ex parte* or without notice and the Court will make an interim order if it thinks it is 'just and convenient'. This means that your children's other parent is able to secure a Non-Molestation Order against you without your attendance, without your knowledge and without giving you the opportunity to be heard, 'Convenient' circumstances include those where there is a risk of harm

if the order is not made, where not making the order will deter the applicant, and where the respondent is evading service. You cannot, however, be guilty of an offence unless you were aware of the order, which makes an interim order fairly pointless.

If your children's other parent makes an *ex parte* application for an interim Non-Molestation Order the accompanying witness statement must state why notice has not been given. If your whereabouts 'cannot after reasonable enquiries be ascertained', the Court does not need to serve the application on you, and can hear the application and make an order without your attendance. The Court may also transfer the proceedings to another court which can make your attendance even more unlikely.

An *ex parte* hearing must have a follow up *inter partes* hearing (with all parties present) as soon as convenient – usually within a week – to consider all the evidence and any interim *ex parte* order should include notification of the return date for the full *inter partes* hearing to review and possibly change the order made. Non-Molestation Orders are made in closed court unless the Court directs otherwise; if the paperwork you receive does not contain notification of such a hearing, return to the issuing court and get a date set. Not that it makes a great deal of difference in practice because once again you are at the mercy of 'judicial discretion' and the hearing has already been held and the order made. Your task therefore is not to resist the making of the order but to overturn an order already made.

12.1.2.4. Defence

Rule 10.3 of the Family Procedure Rules demands that the application must be served on the respondent not less than 2 days before the date of the hearing. Where the power of arrest is attached to an injunction 'the relevant provisions shall be set out in separate clauses of the injunction and those clauses shall not refer to any form of molestation which would not entitle a constable to arrest the respondent'. Thus Non-Molestation Orders should not be granted on spurious grounds.

The applicant must serve the order upon the respondent, and if the hearing has been *ex parte* they must attach the application and the supporting witness statement.

When you are served with an application for a Non-Molestation Order it must have a witness statement attached setting out the reasons for the application. The rules are strict which means that witness statements are often improperly made out and thus inadmissible, though this is rarely an obstacle in practice. As a Litigant-in-Person you will find it very difficult to use this defence if your children's other parent is represented.

You must first check the wording of the order. 'Molest' need not necessarily imply violence, so an order can be made, for example, on the basis of pestering rather than violence. But it would seem to be a valid point that when there is no evidence of violence the order should not mention violence or include any clause forbidding the use or threat

of violence. If it does, insist the clause is removed, which it can be under the **slip rule**; see **Grubb v Grubb [2009] EWCA Civ 976**.
You cannot contest the interim *ex parte* order, but you can contest having it made into a full Non-Molestation Order. You will need to file a sworn statement in response to the allegations made and attend the hearing.

Non-Molestation and Occupation Orders are often made together and it is important for the Court to clarify which bits are which, because the penalties for breach are different. If you are banned from entering your home, for example, that is an Occupation Order and not a Non-Molestation Order. You must not be put at risk of committing a criminal offence when the law does not permit that. Check the wording.

There is an argument that since the order bans you from doing what you deny doing anyway there is no point defending it, other than to avoid costs. You could therefore offer to undertake not to molest in return for having no order for costs against you. You could offer a bilateral Undertaking: you undertake not to use violence or harassment, threaten violence, etc, and the other party does the same; this should satisfy both parties.

An Undertaking can easily be made without representation – which is one reason why legal aid is seldom available to respondents in Non-Mol cases – but making an Undertaking will only resolve a case if the applicant accepts it. As we explain in our section on **Undertakings**, future legislation will make this unlikely.

The best response to a Non-Molestation Order is often to go onto the attack by bringing your own counter application for the same or for shared residence (or contact) with a request that the Court holds a Finding of Fact hearing to overturn the order.

If the Court does not hold a Finding of Fact hearing you should ask the judge to record at the top of the order, 'UPON the Respondent having made no admissions and the Court having made no findings of fact'. This will ensure that in future proceedings the order cannot be used as evidence that you have been violent.

If the order is made you have 14 days in which to mount an appeal, and you will then have to wait at least 3 weeks for a hearing.

12.1.3. Occupation orders

12.1.3.1. Applications

Occupation orders typically go hand-in-hand with Non-Molestation Orders and are made in accordance with **Section 33** of the Family Law Act 1996. The applicant must normally have the right to live in the house already, for example through part-ownership or by having their name on the rental agreement, and must be 'associated' with the respondent.

The Court should consider the housing needs and resources of both parties and their children, their financial resources, the likely effect on the 'health, safety and well-being' of the parties and children if the

order is *not* made and the conduct of the parties. It must balance the risks of making the order against the risks of not making it.

If the applicant does not have the right to occupy they are covered by a different part of the legislation, **Section 36**. The Court must consider additional factors such as the nature and duration of the relationship and whether there were children. Orders can only last 6 months and can be extended for a further 6 months.

The Court can make rulings about who can live in a house, what parts of the house they can use and how they must behave in it. They can prevent a respondent from living in a house, from visiting a house and from going anywhere near a house, including the same street.

Applications are made using **Form FL401** and must be supported by a witness statement. The applicant will need 3 copies for themselves, the Court and the respondent. If the order will entail a change in the occupier a fourth copy will be needed for the landlord or mortgage supplier. It is also necessary to complete a **Form N285** on which the reason for the application is explained.

The applicant must serve the order upon the respondent, and if the hearing has been ex parte they must attach the application and the supporting witness statement.

The object typically is to exclude a parent (usually the father) from the family home and then allow the other parent to occupy it; see, for example, Chalmers v Johns [1999] 1 FLR 392 in which the Court ruled that the Court must first apply Section 33(7) and access the risk of harm to the child; where there is risk of harm the making of the order is mandatory. **Note**: that the criterion is 'risk of harm' and not actual harm, and that it need not necessarily be the child who is at risk.

Under the Family Law Act 1996 you can be ordered to pay rent and bills on the home from which you have been ousted and to keep it in good repair; under the Debtors Act 1869 you cannot be committed if you default.

It is very common for fathers subject to non-molestation and Occupation Orders to find themselves without even sufficient clothes, and you will inevitably want to return to your home to collect some of your things. A popular delaying tactic by solicitors is to demand that you prove the items you wish to take are indeed yours, and are not jointly owned, and that you provide an inventory. Not easy when you don't have access to the house. Obviously these tactics are just filibustering and delay, but you may be forced to return to Court for a Specific Issues Order. If items are jointly owned you will not be able to remove them.

12.1.3.2. Breach

Breach of an Occupation Order is not a criminal offence, but it is a Contempt of Court, and the orders are usually made with a power of arrest. You have to be brought to Court within 24 hours of arrest or released.

12.1.3.3. Ex parte applications

An application may be made *ex parte*, in which case the respondent must be allowed to put their own position as soon as is convenient. The duration of the order is calculated from the commencement of the interim order.

12.1.3.4. Defence

Occupation orders can be overturned. In B v B (Occupation Order) [1999] Fam Law 208 a father and his six-year-old daughter were ousted from their home to make way for the mother and her baby who had been living in a B&B. The local authority would not re-house the father, meaning that the daughter would be forced to live in homeless accommodation or be taken into care. The Appeal Court allowed the father to return to his home while the local authority found alternative accommodation for the mother.

Occupation orders can be used by fathers as well as by mothers; see for example S v F (Occupation Order) [2002] 1 FLR 255 in which the mother had moved out of the house and abandoned her son in London; the father, who had moved to Malaysia and remarried, successfully applied to move back into the London home and look after his son.

As with Non-Molestation Orders if you are the respondent you need to attend the hearing which will be conducted in closed court unless the Court directs otherwise. You may decide not to defend, given that the marriage has broken down anyway. You need to consider what you would achieve by defending; if you have to sell the house in any case, sell up and move on. But remember that not defending could be interpreted in later proceedings as walking out on your children and an admission of whatever is alleged.

12.1.4. Go orders

A variation on the Non-Molestation Order is the Domestic Violence Protection Order, commonly called a 'Go Order'. These were introduced by the Labour Government in April 2010, shelved by the Coalition in September, and re-introduced by the Home Secretary, Theresa May, with a year-long pilot scheme which is to be trialled in the Greater Manchester, Wiltshire and West Mercia police areas throughout 2011.

The scheme enables a police officer of superintendent rank or higher to remove a suspected perpetrator of domestic abuse from his home for a period of 48 hours, and possibly up to 28 days if extended by the Court, when there is merely a suspicion of abuse. The intention is apparently to allow the putative victim to decide whether or not she wants to take the matter to a court, but the forced removal of an individual from his home without the opportunity to be heard in a court is a breach of his human rights. It is also argued that the orders will help victims who are unable to make a full report of the alleged abuse to the police and enable the police to take action on their behalf, but enabling someone to hide behind the police in this way will merely encourage the making of false allegations and other abuses of the orders.

The guilt of an alleged abuser is something which should be tried by a court, and not decided on entirely subjective grounds by a police constable; these orders will be made where there is not sufficient evidence to charge a suspect: evicting him from his home where there is no evidence to do so cannot be justified. It is also not clear what is supposed to happen at the end of the exclusion period.

12.1.5. Section 91(14) orders

If he considers that a litigant is being 'vexatious' or 'oppressive' a judge may make an order under **Section 91(14)** of the Children Act 1989 which will prevent a litigant from making any further applications, or applications of a particular kind, without prior permission. Such 'barring' orders don't prevent further applications entirely: they are a filter and not a barrier; you merely need leave to make applications you could previously have made without leave. If the situation has changed significantly the order can be lifted on application using Form C2. They may apply to all applications, or only to specific ones. Such an order can be applied for by a litigant, or the judge may take it upon himself to impose it. '**Vexatious litigation**' in this context is litigation brought solely to 'vex' or harass an opponent. Section 91(14) reads:

> *On disposing of any application for an order under this Act, the Court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the Court.*

This restriction should only be applied to the most extreme cases, and should only be made where the welfare of the child would be adversely affected by any future application, but it is habitually applied to parents who are merely seeking a reasonable level of contact with their children. It should usually only be made on notice, but may exceptionally be made without notice or even without application. Once made, the order can be difficult to overturn.

There are circumstances in which you may wish to apply for a Section 91 order in respect of your ex. Such an order, in conjunction with an application for sole residence, is the only reasonable alternative to an application for committal, which would not be in the best interests of the children or of the other parent. It will bring endless litigation to an end and force the judge to decide residence (in your favour) without going down the route of punishing the other parent for non-compliance.

When requesting that the Court make the order against an LIP, consider **Re C (A Child) [2009] EWCA Civ 674** in which the importance of following correct procedure is emphasised.

You must support your application with a detailed chronology which will show why the order is necessary. Show that the other parent has consistently ignored and refused to comply with the Court's orders and no other solution is appropriate. Remind the Court of its duty to protect the child's relationships with both parents, and that if given residence you will support contact.

These are some arguments you may use,

- Extended litigation is causing you to become stressed which may in turn have an adverse effect on your children;

- Your ex is a vexatious litigant who is abusing the court process in order to cause you harassment and distress;

- The financial strain on you of proceedings is having an adverse effect upon your children;

- It is in the interests of the child for litigation to end and to settle down into a routine (i.e. one in which you have residence) by stopping the other parent making petty applications. Protracted litigation is harmful to children, and this will prevent that harm;

- You believe it is in the interests of everyone to step away from litigation for a few years: always ask for the order to be made whilst the children are in their minority (basically until age 18 when the lot becomes worthless anyway) as it is not allowing the family to 'move forward with their lives;

- Repeated hearings are causing you difficulties with your employer due to the time needed to attend Court. If this situation continues there is a danger you may lose your job.

Point out you don't want to deprive the other parent of their right to bring a genuine case before the courts but feel that at the current time the process is being abused.

A Children's Guardian may also make a s.91 application. In Re H (A Child) [2010] EWCA 1296 the parents had been fighting over their 11-year-old daughter for a long time. A finding of fact in 2007 found the mother's allegations against the father to be unfounded and residence was subsequently awarded to the father; the mother's application for contact was dismissed, and a s.91(14) order was granted on application by the guardian.

The mother appealed on the grounds that the guardian had no right to make the application and that the judge had misdirected himself and failed to put a time limit on the order.

The Court of Appeal ruled that the guardian was right to apply for the order, the child was a party and any party could make such an application; the judge had not misdirected himself. Only the appeal as to the duration of the order was allowed – the judge should have given a time limit or have explained why he did not.

12.1.5.1. Appealing a s.91(14)

In the case of Re G (A Child) [2003] EWCA Civ 489 in Northampton County Court, HHJ Mitchell recognised that prior to any contact mother 'went to pieces,' and so ordered a **five-year ban** on further contact proceedings concerning a two-year-old child, on the basis that 'everyone needed some peace and a breathing space.' In **Re G (A Child) [2010] EWCA Civ 470** a five year ban made the previous year in Norwich – together with an order for no contact – was considered excessive given the child's age (3-and-a-half) and was reduced to 2 on appeal, together with an order for indirect contact .

In Re F (Minors) (Contact: Restraint Order) – reported in the Times, 2 February 1995 – a restraint order had been imposed on a father who was seeking contact with his daughters. The judge had considered the father's application to be futile because the mother's implacable hostility was 'so deeply rooted, and so total, that she will never agree to contact and she will always do her best to try and make sure that it doesn't happen.'

The decision was overturned in the Appeal Court[360] by Lords Justice Waite and Nourse who said that the father had been 'neither vexatious nor oppressive in his genuine attempts to further the welfare of his daughters by maintaining contact with them'. They said that s.91 should only be used as a measure of last resort to be used against parties who abused their right of access to the courts.

> *The starting point, always, is that every child has a right to be brought up in the knowledge of his non-custodial parent. That is a right which the courts are determined to preserve... Their right to have their welfare served by re-establishing contact with their father at the earliest possible moment requires that the fullest attention should now be given* [to that]*, with the best possible legal and medical help available.*

In B v B [1997] 1 FLR 139 Lord Justice Waite said that s.91 should be read in conjunction with s.1 (1),

> *The judge must, therefore, ask him or herself in every case whether the best interests of the child require interference with the fundamental freedom of a parent to raise issues affecting the child's welfare before the Court as and when such issues arise.*

You should be given notice of a s.91(14) hearing, so your best tactic for stopping it in its tracks is to launch an application for residence before the s.91 order is made. The residence application will have to be adjudicated on, giving you a chance to put your case.

You should always appeal a s.91(14) order on the grounds that it must only be used where the best interests of the child demand it. While you might well be vexed you are not necessarily vexatious. If you can get the matter into the Court of Appeal then the case moves into a public arena where it can be more effectively scrutinised.

The leading case is still Re P (Section 91(14) Guidelines) [1999] 2FLR 573 CA in which Lady Justice Butler-Sloss extracted the following guidelines:

a) s.91(14)is to be read in conjunction with s.1(1) the welfare principle;

b) all relevant circumstances must be taken into account in considering whether to exercise the discretion;

c) any exercise of the s.91(14) jurisdiction is a statutory interference with a person's right to access to the court. However, the section is compliant with the Human Rights Act since it does not *bar* access to the Court but merely *controls* it.

[360] Re F (Contact: Restraint Order) [1995] 1 FLR 956

d) the exercise of s.91(14) requires great care and is to be considered the exception rather than the rule;

e) generally the making of a s.91(14) order is a weapon of last resort in cases of repeated unreasonable application and its use must be proportional to the harm it seeks to prevent;

f) there may be cases where there is no history of repeated applications but the child's welfare makes the order necessary or another order has been made (for contact or residence) and time must be allowed for it to work;

g) a further check is to consider whether there is a serious risk that the child or his primary carer will be subject to unacceptable strain if the order is not made;

h) the order may be made without formal application or of the Court's own motion provided the Court is considering an application by one of the parties for an order under the Act;

i) the order may be with or without time limit;

j) the order should specify the type of application being restrained and be no wider than necessary;

k) without notice *ex parte* orders should only be made in very exceptional circumstances.

Point (g) may be thought to conflict with the paramountcy principle. In DJ v MS [2006] EWCH 1491 (Fam) however, in which the Re P criteria are cited, Mr Justice Coleridge said that the lower court judge 'went too far' in seeking to relieve the pressure on the mother,

> *To impose a restriction is a statutory intrusion to the right of a party to bring proceedings before the Court and to be heard in matters affecting his/her child. Fourthly, the power is therefore to be used with great care and sparingly, the exception and not the rule. Fifthly, it is generally to be seen as a weapon of last resort in cases of repeated and unreasonable applications.*

Consider also Re M (Section 91(14) Order) [1999] 2 FLR 553 and Re C (Prohibition of Further Applications) [2002] EWCA Civ 292 which held it to be wrong in principle, except in exceptional circumstances, to place a Litigant-in-Person at short notice in the position of confronting a s.91(14) order which barred him from dealing with any aspect of the case relating to his children, particularly contact. **Re G [2008] EWCA Civ 1468** held that a barring order should not be sprung on an unrepresented litigant.

Re K (Children) [2010] EWCA Civ 1365 shows the application of the welfare principle: a district judge had dismissed a father's application for contact and imposed a s.91(14) order for a period of one year despite there being no application for it. The father appealed and, although the decision was unappealable, the circuit judge allowed it on welfare grounds.

The mother appealed to the Court of Appeal and her appeal was dismissed: the district judge had been plainly wrong.

Section 91 Orders are often made by judges desperate to bring protracted proceedings to a halt, which means they can often be challenged on technicalities. In properly managed cases with judicial continuity they should not be necessary. You should consider whether further litigation is really in your child's best interests.

12.1.6. Undertakings

We have mentioned 'Undertakings' at various points in this work. An Undertaking is simply a solemn promise made to the Court that you will do or not do a specified act. Breaching an Undertaking is not a criminal offence, but the Court may accept an Undertaking from you rather than impose a Non-Molestation Order provided that the applicant accepts it; the Court must be satisfied that you do not need the threat of a criminal prosecution to persuade you to behave. Undertakings are made on **Form N117**.

For a conviction the applicant for the original order must make an application to the Court and prove beyond reasonable doubt that the Undertaking has been breached. Conviction for Contempt of Court can result in a maximum sentence of 2 years, though it is likely to be suspended. Because it is not a criminal conviction there is no early release on licence and you won't get a criminal record.

The advantage of an Undertaking is that if you are the respondent to a Non-Molestation Order you won't qualify for legal aid (though you might if responding to an Occupation Order and at risk of losing your home) and an Undertaking is something you can do easily as a Litigant-in-Person.

The problem is that the applicant must agree to the Undertaking; if she doesn't she can ask the Court to make the order; this is more likely as she will be legally aided and probably have a solicitor. Under the proposals contained in the forthcoming Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO), however, legal aid will only be made available for cases involving proven domestic violence. If a mother wants legal aid in children proceedings accepting an Undertaking will disqualify her because in itself it will not be accepted as evidence. The Court still has discretion to accept your Undertaking but in the current climate of DV hysteria, will it take the chance?

Fairly obviously more cases are now going to be contested; they will last longer and with greater hostility. Fewer will be resolved through the use of Undertakings. This is the consequence of ill-considered piece-meal reform and knee-jerk legislating. Applicants will desperately make false allegations in order to preserve legal funding while bewildered respondents will be unable to secure legal aid in any circumstances. Justice or discrimination?

12.2. Obstructions

12.2.1. Refusal to hand over

You arrive to collect your child for a period of court-ordered contact and your child's other parent refuses to let your child leave with you. This is possibly the most common experience for parents when contact

is being obstructed; you've got your Contact Order, you think that is the end of the matter, and then your child's other parent simply disregards the order. You have to approach this situation carefully, and play it by ear: if you go in all guns blazing you'll upset the Court and lose everything.

Do not lose your cool. Do not get angry. Do not get violent. Do not try to force your way into the house. You will simply be playing into the other parent's hands and giving them ammunition which will be used against you in Court and make restoring contact much more difficult.

Let's look at the excuses you may be given:

12.2.1.1. 'He doesn't want to see you'

This is a favourite way of preventing contact, and tries to put the responsibility on the child rather than on the obstructive parent where it belongs. It should be obvious that for a child to say this about a decent, loving parent is profoundly unnatural, and evidence of parental alienation. It should set alarm bells ringing in the Court.

Or it could be that the other parent is simply lying.

Emphasise at all times in your **position statement** and in Court that contact with you is in your child's best interest, and that by trying to undermine your relationship the other parent is abusing your child's best interests.

Is this his decision or the other parent's? Has he told you himself, and if not, will he be allowed to? Assuming there is no good reason why he shouldn't want to see you it is probable that he is being alienated against you and you need to deal with that very quickly.

If you feel that your child may 'choose' not to come out of the house when you arrive to collect him, get it written into the Court order that you will pick him up from somewhere else where he's on neutral ground, such as the local McDonalds.

Here's the idea:

- The other parent will take your child there so that he can get to see you; this may go some way to counteracting the 'you don't have to go if you don't want to' messages which your child will have been fed.
- If they don't take him you can then go back to Court for enforcement of the order. You cannot go to Court to enforce moving the child from the other parent's front door to your car.
- Take care when writing a letter; always remember that letters may well be seen by the judge at some stage, they will be put into the 'bundle' he reads, so each letter must be clear in its message:
    - Keep to one topic per message.
    - Put the subject line in bold at the beginning of the letter.

- Put the important part of your message at the start of the letter; it may make it read a little strangely, but if it doesn't grab the reader's attention quickly, he will skip it. Think about how you read a newspaper: you skim read.

- Never be aggressive – if a judge sees that he will think that you are as bad as the resident parent and be justified in thinking you a threat. Use alternative constructions which are less confrontational. You need to get the judge's sympathy; make it clear who is playing games; make it impossible for the judge to put any interpretation on the situation other than that your children's other parent is not obeying the order.

12.2.1.2. 'He's sick

If the complaint is minor then this is just an excuse to deny contact; if it is more serious then why weren't you informed? Don't over-react: play along. If your child's other parent says that you cannot see your child because he has a cold (or other minor ailment) you will simply say how sorry you are to hear that, how disappointed you are not to be able to see him, and how you respect the decision.

You will then telephone regularly to enquire after his health and suggest a new date for contact, such as the following weekend. You should then confirm in a letter what has been agreed.

Play the game: if the other parent doesn't play ball take them back to Court. But you must be seen to be reasonable. We all know what game is being played: it is a familiar tactic, but the judge will always give them the benefit of the doubt, so you have to demonstrate that they are messing you around.

12.2.1.3. 'He's going to a party'

Making other arrangements – for a children's party, football practice, to see grandparents, etc – is another common tactic to prevent contact. You will be familiar with the research which shows contact works best when it is flexible, and you will say you are surprised you didn't get more notice, but you will happily agree to change the contact to another date.

12.2.1.4. 'Last time you brought him back late'

Contact orders must be adhered to, and if you vary from the terms, even though the order strictly applies to the respondent and not the applicant, you will weaken your position and provoke a response. You must explain fully why this happened and give an Undertaking that it won't happen again. Of course your ex is being petty, but more fool you for providing the excuse.

A variation is to express concern that you won't return the child. If there is no good reason for this they are being unreasonable and you will have to return to Court.

12.2.1.5. Concerns about your new partner

A great deal of child abuse is perpetrated by mothers' new partners and boyfriends, and fathers are entirely justified in being concerned. Fathers' new girlfriends are not implicated in this way, so mothers don't have this particular excuse. Fathers should also be aware that generally most child abuse is perpetrated by mothers. It is understandable that both of you will be worried about your child being introduced to a new partner, but be reasonable: most people don't abuse children.

Both of you are entitled to move on and form new relationships, but this is very often the point where things start to go wrong. You need to deal with the fears your child's other parent has with sensitivity.

An alternative ruse is to express concerns about your family. If there were no concerns before you separated this is likely to be unreasonable. Your family is your child's family, and he has a right to his family life.

12.2.1.6. Concerns about your home

Family breakdown puts great stress on finances and one or both of you may be forced into accommodation which is less than ideal. Fathers in particular will have problems as they will receive no support from the state. Ask the other parent back to your home to view the accommodation – if they refuse their objection is unwarranted.

Don't fall into the trap one mother fell for, and let your ex pay for improvements to your home. You will then be indebted to your ex until the loan is paid off, and they will use that to manipulate you.

Perhaps the other parent is more concerned about your ability to care for your child properly; is there any good reason for this? We don't all have the same views on parenting and we have to allow for that.

12.2.1.7. No reason given

This also is common. Your ex – it is more likely to be the mother – simply believes that the child belongs to her and she doesn't need to give a reason.

You will probably have to return to Court, though you might try mediation first. Don't try to reason or argue on the doorstep, she will become more entrenched and you will become frustrated and angry. **Walk away**, before there is an incident or the police are called.

12.2.1.8. Some tips

- Stay cool; don't get angry; don't be drawn into a confrontation.
- Enter every incident into your chronology; this will build up a picture of what is going on and be very useful if there are further proceedings.

- If you don't yet have a Contact Order, apply for one now. Better still, apply for shared residence. If you do have a Contact Order, apply to have it enforced. Resist any attempt the Court may make to reduce the level of contact in an attempt to make it work. This is a strategy for failure.

- Explain to the police you want your children to come to the door and speak with you so you can check they are ok. Once there ask them if they wish to come with you now. Tell them to come down and see you, then calmly and quietly take them away. You will need to stick at this as it's a long game your children's other parent is playing, and the Court won't help you much.

- If you don't have a Non-Molestation Order against you, take a witness. Take a member of the same sex; if you take someone of the opposite sex it will be assumed that you are sleeping with them and they will not make a compellable and competent witness. Go to your former home and pick up your child. If your child's other parent doesn't make him available call the police and tell them that you are there to pick up your child as arranged, and that you fear the children could be harmed or that you fear for your own safety; tell them you fear a possible breach of the peace and you won't leave until they arrive. When they arrive, keep your hands in your pockets and maintain a passive and helpful tone. Get them on your side as the reasonable parent that you are.

- Contact orders should always have a clause that says lost contact should be compensated.

A variation on these games is that you've managed to collect your child for a scheduled contact visit, but when you go back to your ex's home to return your child there's no one there. If you've made every attempt to return your child but have been unable to do so you must obviously take your child home with you, having left a note at your ex's house.

It's not unlikely they'll then raise merry hell and send the police round to say hello. Pre-empt this by contacting the police immediately, explaining what has happened and emphasising that you have made every effort to comply with the Contact Order. Keep a record of whom you spoke to, when you spoke to them, and what was said.

You probably need to return to Court to have handover arrangements set out more clearly in a further order; the probability is your children's other parent is deliberately doing this in order to place you in breach of the order so that they can then take you back to Court to reduce contact. Get in there first.

12.2.2. Blocking overnight stays

Insisting that the children are too young is a familiar tactic to prevent overnight staying contact.

Overnight stays are critically important, as they represent the beginning of a move towards a more complete 'family life' status for yourself and your child. You can bathe him, put him to bed, read him a story, deal with his night-time needs, get him up in the morning, make him breakfast, take him to school, etc.

This pattern has obvious financial implications, necessitating additional bedrooms, beds, bedding, clothing, toys, books and meals, for example – costs which are not often recognised by state agencies.

There is no minimum age at which a child can stay overnight. No doubt if you are a father your children's mother will be advised that taking a young child from her will be disruptive to its bonding, but certainly beyond the age of 6 months children are able to make multiple attachments, and these won't necessarily form a hierarchy with the mother at the top. A child will not be distressed unless the resident parent deliberately or inadvertently causes distress by demonstrating her own anxiety. Arguments against overnight staying are usually motivated by the desire to thwart contact.

Kelly and Lamb [361] showed that for children under 2 or 3 the transitions between parents need to be more rather than fewer in order to maintain the continuity of relationships and security. As children grow older they can cope with longer separations from each parent, and toddlers can manage 2 consecutive nights away without distress. They argued that the importance of maintaining the vital relationships with both parents had been lost in the emphasis on the stability offered by one geographical home. There was some indication that girls benefit more than boys from overnight staying.[362]

Kelly and Lamb further emphasised that all available research supported overnight staying for infants[363] because it strengthens the child's relationship with both parents. Psychologist Marsha Kline Pruett and her colleagues conducted a study in conjunction with the Connecticut courts of fathers who had no overnight staying contact, fathers who had one night per week and fathers who had two nights or more. She found that fathers' parenting is very vulnerable to maternal opposition, and that where there is conflict fathers' involvement suffers. By contrast she found that conflict does not seem to impact mothers' relationships with their children.

The overnight stays themselves were less significant than the degree of conflict and did not protect children from the effects of parental strife. What the study did show was that opposition or rejection by mothers towards fathers' parenting is influential in driving fathers away.

There is also evidence that where contact is day-time only it is more fragile and more likely to reduce over time; overnight staying is more durable. Overnight contact places less pressure on time constraints and the need to cram a month's parenting into a tightly defined duration. Children are encouraged to feel that both houses are their homes, and they are not merely visitors to their fathers.

Support for overnight staying has been challenged[364] using the now-discredited argument (based on studies by John Bowlby) that infants can only form a single bond with a parent; Kelly and Lamb pointed out

[361] Joan B Kelly, Michael E Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, Family and Conciliation courts Review; Los Angeles; Jul 2000; Volume: 38 Issue: 3 : 297-311, Sage Publications.
[362] Pruett, M.K., Ebling, R., & Insabella, G. *Critical aspects of parenting plans for young children. Interjecting data into the debate about overnights.* Family Court Review, 2004. (42) 1: p. 39-59.

[363] Kelly, J. And Lamb, M., *Build the Bond*, Family Court Review: an interdisciplinary journal, Volume 39, Number 4, October 2001
[364] For example by Solomon and Biringen

the complete lack of evidence for this challenge,[365] and that it risks curtailing a relationship essential to the emotional and social development of the child. Nevertheless it continues to hold sway in the belief systems of many Family Court judges and the CAFCASS officers who advise them. *A Guide to Contact Arrangements for Children* by the Association of Family Court Welfare Officers, for example, doesn't recommend overnight staying until children are 2 years old, and then only once a month which must be 'carefully monitored for any distress to the child'. By the age of three they recommend the occasional two-night stay. Be aware that your CAFCASS officer may be some way behind the times; contact of this level severely risks preventing any sort of relationship developing between father and child.

Of course, for younger children, staying away from their mother may be more difficult than for older children, especially if there has been a break in contact, which is why it's really important there should be no break. Try to see things from your child's perspective and only do what they are comfortable with. Remember however that a little homesickness now can avert a tragedy later.

Once your child is of school age it is essential that a non-resident parent should be able to collect him from school on a Friday afternoon and take him back to school on a Monday morning. You should be able to do this every other week, and certainly no less than once a month. This way you can help him with his homework on a Friday night; as we've seen, both parents' involvement is enormously beneficial to a child's educational attainment and intellectually development. You **must** emphasise these points in Court and use the evidence we have given you.

To make their stay with you less stressful place a photograph of the other parent next to the beds they will sleep in. Make sure you have the telephone number and that you promise to phone if the children get upset. Depending on your relationship with them, let the other parent stay over on the first night.

An Australian study[366] showed the benefits of overnight staying for adolescents. They showed greater closeness and better quality relationships with their fathers than their peers who had no such overnight contact. There was no evidence of any downside.

In Blanket Restrictions Dr Richard Warshak wrote,[367]

> *Blanket restrictions requiring young children to spend every night with the same parent after divorce are inconsistent with current knowledge about the needs and capacities of young children and their parents, and that the practice of discouraging overnight contact cannot be supported by appeals to theory, research, clinical experience, common experience, or common sense.*

There is, in short, absolutely no scientific research that supports the

[365] Kelly, J. And Lamb, M., *Using the empirical literature to guide the development of parenting plans for young children: a rejoinder to Solomon and Biringen*

[366] Judy Cashmore, Patrick Parkinson & Alan Taylor, Overnight *Stays and Children's Relationships with Resident and Nonresident Parents after Divorce*, November 2007

[367] Richard A. Warshak, *Blanket Restrictions: Overnight Contact Between Parents and Young Children*, in Family and Conciliation courts Review, Volume 38, Number 4, October 2000, pages 422-445.

idea that overnight stays with a father may in any way be harmful to an infant or older child.

In **Re C (A Child) [2006] EWCA Civ 235** the father successfully appealed the lower court's refusal to grant a Shared Residence Order on the grounds that the judge had 'misdirected himself in law' (a standard formula) and had erred on the facts that increasing the number of overnight stays would be 'disadvantageous and confusing'.

Of course, while you are researching the benefits of overnight staying your ex will be hunting reasons to refuse you contact. There's even a line-by-line refutation of the Kelly/ Lamb argument on the 'Liz Library', a repository of hard-core feminism. Her position is based on the lack of evidence cited, but this cuts both ways – you cannot experiment on children to produce the answers you want.

12.2.3. You are controlling

This is another extremely common argument raised against contact. The other parent will maintain that you only want contact in order to exert control over your children and possibly over your ex, and will exploit any contact granted to dominate and manipulate.

The allegation that you are controlling and manipulative is standard and very often an indication that your ex is being advised, if not by a solicitor then by a feminist organisation such as Women's Aid or Refuge, who seem to think that this is the *only* reason why a man should want contact with his children. Such allegations are effective in persuading CAFCASS to recommend against contact.

You must reply that you want contact simply because it is in your child's best interest to enjoy a full relationship with both parents, and he has a right to respect for his family life.

You could suggest that all hand-overs are conducted by intermediaries so that you and your ex do not need to meet. One possibility is to arrange contact where a trusted relative (such as a grandparent) can be present. This isn't ideal and can be restrictive, but it is much better than supervised contact in a contact centre, which might be your only other option.

Repeated phone calls from you or text messages made purely to try to establish contact can be represented as harassment, so be aware of this. If you are repeatedly phoning in order to comply with a Court Order for contact, this is a legitimate defence.

12.2.4. You are controlled

You are so desperate to maintain contact with your children, and so frightened you may lose it, that your children's other parent has you dancing to their tune like the proverbial organ-grinder's monkey. It's another common situation. Both mothers and fathers report the resident parent using the power that residence gives them to manipulate and control.

Placing conditions on contact in order to influence your behaviour is a typical tactic and should be resisted. Even demanding that you phone your ex when, for example, you reach your destination is an attempt to exert control over the time your child spends with you. Such

behaviour causes conflict and can escalate: your time with your child is your own.

Your ex may fail to respect that and arrange activities for your child during your contact time such as after-school clubs or cricket and rugby training at weekends. All such behaviour has the effect of minimising your parenting time. Parents must recognise that post-separation life must be different, and resist any inclination to cut into or otherwise interfere with the other parent's time with their child.

Unfortunately bowing to such conditions will merely teach the other parent that the tactic works, and they will impose further conditions. Often this behaviour will be used to prevent you forming new relationships, introducing your children to new partners, or generally getting on with your life. Not only do you have an absolute right to move on and find a new partner, with whom, if you wish, you may start a new family, but any sign on your part that you are submitting to their terms will only serve to encourage them and make matters worse.

They of course will accept no restrictions from you on whom they see or on whom they introduce to your children, so do not even attempt to restrict this. Any attempt by you to exert any control on your children's other parent will go down very badly with CAFCASS and the Court and will count heavily against you. If you can bring yourself to do it, wish them the best in their new life, and try to get on well with the new partner(s). Always put the interests of your children first.

If your children's other parent isn't doing everything that can be done to ensure that your relationship with your child continues after separation then you are in trouble. Any obstruction or delay means they are putting their differences with you before their responsibility for their child.

12.2.5. Misrepresenting orders

Sometimes a parent will misrepresent an order to another party such as a school, saying, for example, that it prevents the other parent from having contact with their children or from picking up the children from school.

Clearly a parent who does this is in contempt of the order and if they are assisted in this by their solicitors they too are in contempt. You would be justified in asking the Court if you could give the school a copy of the order to confirm the actual arrangement.

12.2.6. Refusal to obey the Court

Parents determined to obstruct contact may also refuse to comply with other aspects of proceedings. If a party refuses to do something the Court tells them to do you must bring this to the Court's attention. The Court may impose sanctions or award costs. We deal with the enforcement of Court Orders in the next chapter.

12.2.7. The CS argument

Some people argue that fathers who want more time with their children just want to pay less child support. This is because denying or obstructing contact is rewarded by the child support system with higher payments while increasing contact results in reduced payments. This is a vicious, contemptible argument, and if you are reading this you will know how false it is. The truth is that many fathers pay out so much in child support that they cannot afford to have contact with their children.

Even if you are failing to pay child support, it is no reason for your child not to have contact with you; the right to contact is his, not yours. The courts don't accept this as a valid reason to limit contact; disputes over child support are a matter for the CSA or CMEC, the courts cannot intervene.

Our view is simple. Both parents are equally responsible for parenting their children. If for any reason you are unable to fulfil your part of the bargain equally then you should pay financial compensation to the other parent for their greater financial burden. The amount you pay should be agreed between you, but you should not have to pay the extortionate amounts demanded by the CSA or CMEC.

If you are excluded from being an equal parent to your child, the other parent should not be allowed to profit from a wholly unacceptable act of defective parenting.

12.2.8. Sending in the police

When your children's other parent makes false allegations against you they will be more plausible if at the same time they make a complaint to the police. In this situation the local police Child Protection Unit will want to interview you. Don't be alarmed by this if the allegations are false; the Child Protection officers are far better trained and more experienced than CAFCASS, and are good at determining whether allegations are false or not. They are very thorough and an interview will last several hours.

The police will normally want to interview you in a police station so that they can record the interview. Sometimes they will offer to interview you at home. It is important that the interview is recorded in case you need to refer to it later. They will ask you if you wish to have a solicitor with you. If you are in a police station you can ask for the duty solicitor. This is standard procedure and provides a check on how the police behave towards you. It will not be interpreted as an indication of guilt if you ask for a solicitor.

Remember that you are being interviewed about a criminal offence, so the solicitor will be experienced in criminal law and not in family law. Asking for a solicitor in these circumstances is a good precaution. The police will probably read you your rights; don't be intimidated by this, but it does indicate the seriousness of the situation you have been pushed into.

If you are read your rights this information will be retained and may be entered on an enhanced Criminal Records Bureau check, but not a

standard one (it is up to the Chief Police Officer what information is released in an enhanced CRB check).

When the police interview you ensure that you have written down in front of you everything you wish to say to them. It is easy to forget what you want to say when you are under pressure. Stay calm and collected and do not raise your voice. Be polite and friendly.

Note: that if the interview is based on an earlier interview with your ex in which false allegations were made, the police will regard that interview as confidential and will therefore not be able to tell you what allegations have been made. This can be very frustrating later in Court when you will need to refer to the allegations which have been made.

For further information see **Section 18.2** on Arrest.

12.2.9. Solicitors' letters

Threatening letters are probably the most common tactic solicitors will use against you at the start of a case; solicitors will routinely write letters and threaten injunctions. A solicitor's letter has no legal status and you are not in breach of any law if you ignore it, though you will provoke further action which you will probably not be able to ignore. Solicitors often ignore letters from applicants or their solicitors because it creates additional delay. If they are paid through legal aid they may ignore a letter simply because they are not being paid to reply to it.

Go down to your local police station and take the solicitor's letter threatening the injunction and insist politely but firmly that the police log the incident as harassment and/or domestic violence (emotional abuse) designed to cause you distress. Make sure you get an incident number.

Ask the police what action they will take. This strategy may well be difficult and will take you some time because the police do not come across this sort of response very often. The more often they do, the better they will be able to deal with it. Persevere.

When you have done that explain to the police that you will be attending the house to collect your child for a planned contact visit and that there may be a breach of the peace by your ex. Ask the police to come along with you or meet you there as described above.

It is a very common tactic for a solicitor to send you a letter ordering you to leave your own home; the worst possible thing you can do in response is to move out. **Moving out** will change the *status quo* and encourage the Court to make an order based on your children's other parent having residence.

Stay put; a solicitor's letter is just a bluff designed to intimidate you in the hope that you are ignorant of the law, it is not legally enforceable; if you move out you could lose everything, including your children. You could move out on the understanding that you will get contact and then find that you have been duped; furthermore, moving out will be presented in Court as if you have abandoned your children. Even if your own solicitor advises you to move out, DON'T! (and dump

your solicitor). Do not leave your house under any circumstances. You will come to regret it.

If you have moved out, try moving back in – it's your house!

12.2.9.1. Answering a letter

Never destroy a letter from your children's other parent or from their solicitor, however provocative it is. File all letters you receive and list them in your Chronology so that you can retrieve them and refer to them should you need to later on.

You do not have to reply, but if you do be very careful what you write; if they can they will use it against you, so don't write anything you wouldn't want the judge to read. Remain polite at all times but firm in sticking to your position. Keep your letters short, accurate and to the point. Do not let solicitors bully or intimidate you; they will get away with it if they can.

Don't agree to anything a solicitor puts in a letter, for example about contact. It will almost certainly not be in your or your children's best interest. Solicitors have no authority to tell you what to do. Either suggest that you go to mediation, or get the agreement put into a Court Order once you have had time to discuss it with your McKenzie. It is very unlikely that any agreement will suit everyone unless there has been some sort of mediation or negotiation.

Never, ever, ever confess to a false allegation because you think it will hasten contact. It won't, and will quite possibly destroy your chances of winning contact for good.

Be careful when referring to any points of law; assume that the solicitor knows the law and case precedents better than you do (even if it seems they don't; they may be setting you a trap).

Only deal with one issue per letter; if necessary write several letters. This will oblige the solicitor to reply to each issue, if you put all the issues in one letter he may be selective. If your children's other parent is not receiving legal aid this will put pressure on their finances.

Send all letters by recorded delivery and keep the receipts. You can use the tracking number on the letter as your reference.

If you haven't received a reply within 2 weeks send a polite reminder asking for a reply within 7 days; remind the solicitor that Section 1(2) of the Children Act cautions against unnecessary delay.

12.2.10. Dirty tricks

If you are representing yourself – with or without a McKenzie – and your ex is represented, their solicitor is likely to use every dirty trick in the book to take advantage of your inexperience and ignorance. It is important that you recognise a trap or power game when you see it, that you retain your cool to prevent hostilities escalating, and that you

have anticipated and thought ahead so that you have a response prepared. Some of the most common tactics are these:

- Delay – we've already emphasised how important it is to fight delay. Delay plays into the hands of a resident parent because it helps to establish a *status quo* in which the non-resident parent is absent; there is delay built into every step in the process and a solicitor will exploit every opportunity.

  A popular trick is this: you hear nothing from the other litigant's solicitor until just before the hearing is due, then you negotiate and the other party appears (according to their solicitor) to be about to settle, so their solicitor suggests a postponement because they're about to settle, so you agree and the hearing is then postponed, and then.... yes you guessed it.... nothing. So you book another hearing – months down the line – and there is more frantic negotiation just beforehand, and agreement is reached, the hearing is postponed... And again, nothing.

  You need to fight this aggressively. Demand that this flagrant breach of the 'no delay' principle is contrary to your child's welfare and the hearing must be held whether or not the other party attends. You should also demand costs.

- Harassment charges – this ruse seems to be increasingly popular.

- The offer you must refuse – used in financial remedy (ancillary relief) hearings; they make an offer based on you giving up the house, accepting all debts, etc. You naturally refuse, and they then say in Court, 'well, we made an offer but he/she refused it'.

- The other offer you must refuse – 'give up all claims to the house (and/or other assets) and we won't pursue you for child support'. This is hugely dishonest because it is not enforceable, and the CSA/CMEC will ignore any agreement made in Court.

- Unnecessary tests – court-ordered tests such as hair strand tests and DNA tests are another ploy to introduce further delay and the results are often negative.

- Anger management classes – these are demanded by the other side as a condition of contact. If you refuse you are seen to be obstructive; if you agree you have then admitted you have a problem with anger. You are better off refusing, but it's a close call.

- Applying for sole residence – even when your ex will accept shared residence: this is designed to scare the bejaysus out of you and force you to agree to some other demand, perhaps a financial one.

- Block all communication between you and your ex – this causes greater conflict, creates issues that don't need to exist, increases legal fees and wears you down. It can also result in a cessation of parent-child contact if you can't get to see your children because you can't arrange any parenting time. If communication stops suddenly be very alert – your ex may be planning an abduction.

- Wasted hearings – you turn up to Court but your ex doesn't; you hang around but they don't show: you've wasted a day off work and tried your employer's dwindling patience for nothing. If your ex

misses a court hearing be very alert – they may be planning an abduction.

- Video links – this normally applies only if you are the father, as it exploits the false gendered perception of domestic violence; your ex is encouraged to persuade the Court that she is so terrified of you that she can only attend via a video link. This is obviously designed to present you as a violent monster.

- Spurious applications – applications, for example, for Section 91 orders are designed to block your own applications, while applications for non-molestation and occupation orders add delay and cast doubt on your suitability to be a parent.

- Counter applications – countering, for example, an application for contact with one for residence is a standard strategy, but can give you the opportunity to have an order made for shared residence.

- Late applications – another delaying tactic: the other team can make an application the day before the hearing or even in court to ambush and wrong-foot you so that you and your advisors have no opportunity to discuss or plan a response. They may also file documents very late, even at the hearing itself. You must ask for time to read and consider these, though be aware that this will cause more delay. Don't try to do this yourself – the Court will probably not allow you to use that evidence.

- If you have been excluded from your home by an Occupation Order and you need access so you can collect your belongings solicitors may demand that you provide an inventory of all you wish to take and provide evidence of ownership. Obviously this is just another delaying tactic, and one that will force you to make further applications to the Court.

To make matters worse (sorry), there are now companies offering fast-track access to Non-Molestation and Occupation Orders and to other injunctions for a fixed fee. The double-glazing approach to law can only compromise justice, and demonstrates how easily the unscrupulous can exploit the destruction of parent/child relationships as a source of monetary profit.

12.2.11. Misleading the Court

In terms of what is mandatory, misleading a court is an offence for all solicitors, whether or not they are members of Resolution. The Access to Justice Act 1999 places upon solicitors 'a duty to the Court to act with independence in the interests of justice', and a duty to comply with the rules of conduct of the Law Society, and 'those duties shall over-ride any obligation which the (solicitor) may have, if it is inconsistent with them'. Any solicitor who misleads a court would be committing an offence under this Act.

Resolution sets out standards which solicitors are expected to observe, but their approach is that the 'guidelines' for Family Law Practitioners are 'aspirational' and not mandatory, thus little can be done when solicitors breach their standards. Resolution take the line that if a client has instructed a solicitor to lie in court the solicitor is not at fault.

The only legal route you can take in order to protect yourself if your ex's solicitor has lied about you is to take proceedings for perjury; should the judge refuse, claiming that the perjury was not relevant or applicable to the case, then your only option is to appeal.

12.2.12. Failure to contact you

If you suffer financial loss because your ex's solicitor fails to communicate with you when instructed – for example, to tell you that a session of contact has been cancelled – issue a Small Claim in the County Court against the solicitors for compensation of any travel costs, etc to you. The fee you will have to pay varies according to the amount of the claim; it is cheaper to claim online using the **Money Claim On-Line** service. Write a letter to the solicitors first explaining the action you intend to take, and you may be able to settle without going to court.

12.3. Psychological Disorders

12.3.1. Introduction

Anyone who tries to prevent their children from continuing a loving and supportive relationship with a committed and responsible parent is clearly not acting in their child's best interests, and the question of psychological illness must inevitably arise.

A high percentage of parents who try to cut the other parent out of their children's lives have been diagnosed as bi-polar. This term refers to the oscillation some individuals experience between periods of elevation or mania, and periods of depression – thus such individuals are also termed manic-depressive.

Indisputably something erratic is also going on in the minds of parents consumed by implacable hostility – the irrational refusal to contemplate a child's need for the other parent; of parents who alienate their children against the other parent; and of parents who habitually lie and make false (and often wildly implausible) allegations.

US lawyer, mediator and therapist Bill Eddy says,[368]

> *Family Court is perfectly suited to the fantasies of someone with a personality disorder: there is an all-powerful person (the judge) who will punish or control the other spouse. The focus of the Court process is perceived as fixing blame - and many with personality disorders are experts at blame. There is a professional ally who will champion their cause (their attorney - or if no attorney, the judge). A case is properly prepared by gathering statements from allies - family, friends, and professionals. (Seeking to gain the allegiance of the children is automatic - they too are seen as either allies or enemies. A simple admonition will not stop this.) Generally,*

[368] Bill Eddy, *How Personality Disorders Drive Family Court Litigation*, http://www.articlesbase.com/divorce-articles/how-personality-disorders-drive-family-court-litigation-403019.html

those with personality disorders are highly skilled at - and invested in - the adversarial process.

Determining why parents behave like this is more difficult, and there are a number of theories, including the need to control, reasons of revenge or vindictiveness, and a purely financial explanation; certainly securing sole residence confers considerable financial advantage. Parents who implacably oppose contact are commonly suffering from psychiatric disorders such as 'Borderline Personality Disorder' (BPD), and 'Factitious Disorder' (Münchausen's Syndrome by Proxy, or MSbP), similar disorders including delusional thinking, and psychopathic personalities.

Psychological explanations include the Medea Complex, in which parents harm or kill their children, and Divorce Related Malicious Mother (or Mom) Syndrome, a term invented by Ira David Turkat of the Florida Institute of Psychology in order to provoke debate about a very real issue; it comprises parental alienation, malicious allegations and actions, excessive and prolonged litigation, the sabotage of relationships and the prevention of contact, unwarranted lying to the children and to others, and violations of the law (such as the wilful disregard of Court Orders and criminal damage to the other parent's property). Turkat's name for the syndrome implies that it is the divorce process itself which triggers it.

12.4.2. Implacable hostility

Implacable (or intractable) hostility does what it says on the tin. It is an entirely remorseless and irrational hatred of the non-resident parent and opposition to all contact and it is unique to contact and custody disputes. Implacable hostility lies behind parental alienation and false allegations.

Court Orders, penal notices and even committal are ineffective in severe cases.

Most contact and custody disputes are relatively easily and swiftly resolved: no sane parent wants to stay in the family justice system longer than they have to. There remains, however, a stubborn minority of cases which do not respond to reason and in which one parent remains absolutely determined to drag proceedings out for as long as they can.

Our view is that such parents are suffering from a personality disorder, that there should be psychiatric analysis and treatment available for them and that their children should be protected from their behaviour. Any parent fighting for contact who suggests this, however, will be treated as vindictive and vexatious.

Implacable hostility is a legal term and not a medical one. It only applies where no valid reasons have been given to oppose contact. If the other parent of your child is implacably hostile you've got a problem. Implacable hostility is enabled to develop in the Family

Courts because it is tolerated and even rewarded, and because of the disgracefully lax approach to delay.

The courts are supposed to consider the wishes of the child and are unwilling to force contact on alienated children, and they are very poor at analysing these cases; forcing contact on a child against a resident parent's will has been deemed to be emotionally harmful to the child (Re D (A Minor) (Contact: Mother's Hostility) [1993] 2 FLR 1). This view should be resisted, and the Court should consider the medium and long term developmental impact on the child and not give excessive weight to a merely transient effect. If the non-resident parent is not abusive a child who says he doesn't want to see his parent has clearly been alienated.

If contact is in the child's best interests, the implacable hostility of a resident parent should not be allowed to prevent it; in Re J (A Minor) (Contact) [1994] 1 FLR 729 Balcombe said,

> *Judges should be very reluctant to allow the implacable hostility of one parent (usually the parent who has a Residence Order in his or her favour), to deter them from making a Contact Order where they believe the child's welfare requires it. The danger of allowing the implacable hostility of the residential parent (usually the mother) to frustrate the court's decision is too obvious to require repetition on my part.*

Also look at Re P (A Minor) (Contact) [1994] 2 FLR 374. It is not acceptable that a court should make no order simply because it is likely not to be obeyed: Re S (Contact: Grandparents) [1996] 1 FLR 158.

An increasingly effective approach, at least in the US, is to view implacable hostility as a breach of your human rights and a variety of domestic violence.

12.4.3. Postnatal depression

At least one mother in ten suffers from postnatal depression (PND), with symptoms ranging from the common 'baby blues' to crippling debilitating illness. Postnatal depression is often characterised by feelings of deep anxiety and panic attacks, and irrational, obsessive and repetitive fears about the baby's health and welfare. Sufferers can imagine that ordinary household objects represent a threat to the baby, that harmless adults present a threat, even that they themselves do. In its most severe form – termed puerperal psychosis – mothers will suffer very severe depression, personality change, hallucinations and delusions.

Fathers need to be aware of PND and understand how to deal with it. Mothers will need a great deal of love and support, but may also require psychiatric treatment and even hospitalisation. Some mothers will neglect their children, others will even harm them. PND is repeatedly used as a defence in child homicide cases.

Many fathers report significant personality changes in their partners, lasting up to a year or so, each time they have a child. If you suspect that your partner or your child's mother has the condition the first person you should contact is the health visitor who will use a diagnostic questionnaire called the Edinburgh Postnatal Depression

Scale.[369] The causes of PND are the subject of much debate, but include extreme tiredness following a difficult labour, an overwhelming sense of responsibility for a new life, an inability to cope – often when the new mother is left alone all day, poor diet, and sudden hormonal changes following the birth.

PND is an extremely serious condition which can occasionally lead to the death of a child. Undoubtedly it has a part to play in Family Court dramas, particularly where there are false allegations and alienation, and other indications of unwarranted behaviour. It needs to be diagnosed early, and treated with counselling, psychotherapy or drugs, though these should be avoided if the mother is breastfeeding. Nearly half of affected mothers will deny that they have the condition, and hide it from health visitors; they are worried, not unreasonably, that their children will be taken away.[370]

Recent studies have shown that fathers too can suffer from PND, particularly when their partners are sufferers, and that the habitual prejudice amongst health visitors and midwives against fathers, which tends to exclude and marginalise them, is a major contributing factor. There is very little understanding or support available for such fathers.

Should you raise the issue of postnatal depression in Court? If it has been diagnosed, then certainly; otherwise you are likely to be met with emphatic denial and be accused of being merely malicious.

[369] http://www.fresno.ucsf.edu/pediatrics/downloads/edinburghscale.pdf
[370] *Mothers 'cover up' depression*, The Times, 28 November 2005, http://www.timesonline.co.uk/tol/news/uk/health/article597314.ece

12.4.4. Personality disorders

12.4.4.1. Antisocial

The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) identities 10 personality disorders organised into 3 groups or Clusters. Much of the behaviour exhibited by alienating and implacably hostile parents is typical of people with one of the four Cluster B disorders (the so-called 'Drama Group'). The first of these disorders is the Antisocial Personality Disorder, formerly known as sociopathy, which is characterised by a disregard for others, and often a contempt for the law and acceptable behaviour; most sufferers are male and many were neglected or abused as children.

12.3.1.1. Histrionic

The second Drama Group disorder is Histrionic (or hysterical) Personality Disorder, characterised by theatricality and a need for attention (the familiar 'drama queen') and sexual conquest, often sexualising non-sexual relationships. Such people are frequently hypochondriacs; they are self-centred, self-indulgent and excessively dependent on others. As their relationships become more intimate the pathology worsens, and they can indulge in manipulative suicide threats. Most sufferers of HPD are women; the disorder is only rarely found in men.

12.3.1.2. Narcissistic

Narcissistic Personality Disorder is characterised by a unreal sense of brilliance, self-importance and entitlement; narcissists are exploitative, lack empathy and seek constantly to buttress their false selves. They over-react to criticism, and are ambitious beyond their competence. They are unaware, dismissive and intolerant of others' needs and views; they see their children as extensions of their selves, and demand behaviour from them which meets their own emotional needs. They can be neglectful or violently abusive parents. One suggested possible cause is excessive and unrealistic praise during childhood, but another more likely cause is impoverished self-esteem, occurring at a young age. Often these individuals have no father or an emotionally absent one. As they grow older they overcompensate for their lack of self-esteem, becoming emotionally distant and inflating their false sense of self-worth. In therapy they are grossly defensive, adamantly believing that it is 'everyone else's fault'.

12.3.1.3. Borderline

The final disorder in this cluster, and the one perhaps most relevant to excluded fathers, is Borderline Personality Disorder (BP), whose sufferers classically have unstable relationships; their views of others can shift rapidly from very positive to very negative, and they will violently attach themselves to and detach themselves from lovers, spouses and friends. They will engage in self-destructive behaviour such as suicide threats (about 1 in 10 sufferers will be successful), self-harming, reckless spending and binge eating or anorexia; they are commonly drug and alcohol abusers and gamblers.

They are angry, impulsive and confused about their identities, sometimes doubting their very existence. They view the world as a dangerous and malevolent place and act accordingly, seeing threat and rejection where none exists and abruptly ending relationships before their partner can end them; implacable hostility is closely associated with this disorder. The condition strikes in late teens/early adulthood and only persists for about a decade, which explains why a borderline wife can leave one husband a nervous wreck and then go on to have a successful and normal marriage with her second husband. Most sufferers are female and there are strong links to childhood neglect and abuse.

12.4.5. Adjustment disorder

Where there is insufficient evidence to make a diagnosis of Anxiety Disorder, Post-Traumatic Stress Disorder, or Acute Stress Disorder, Adjustment Disorder provides something of a catch-all. It can be defined as an over-reaction to an accepted cause of stress leading to significant impairment in social and occupational functioning; in particular it can be a response to chronic or recurrent stressors. Suicide is common amongst patients with Adjustment Disorder.

The diagnostic criteria for Adjustment Disorder provided by the DSM-IV are:

A. The development of emotional or behavioral symptoms in response to an identifiable stressor(s) occurring within three months of the onset of the stressor(s).

B. These symptoms or behaviors are clinically significant as evidenced by either of the following:

1. marked distress that is in excess of what would be expected from exposure to the stressor

2. significant impairment in social or occupational (academic) functioning.

C. The stress-related disturbance does not meet the criteria for another specific Axis I disorder and is not merely an exacerbation of a preexisting Axis I or Axis II disorder.

D. The symptoms do not represent Bereavement.

E. Once the stressor (or its consequences) has terminated, the symptoms do not persist for more than an additional six months.

In the context of the Family Courts it may well be that a psychotherapist will consider your reaction to the stress of fighting your case to be excessive. You will need to persuade him or her that it is proportionate.

12.4.6. Asperger's Syndrome

It is important to acknowledge that there are conditions – such as Asperger's Syndrome, a form of autism – which affect how people perceive the world and how they interact with others, which may be involved in separation and contact denial. The current consensus – and it is fundamentally political – is that both partners are equally at fault when a marriage or cohabitation breaks down. We dispute this view.

Asperger's Syndrome is estimated to affect between 3 and 7 in 1,000 of the population to varying degrees, and affects about 4 times as many men as women; it is under-diagnosed amongst adults because routine diagnosis began only in 1992. Such neurological disorders (except alcoholism) are rarely considered by the professionals – lawyers, counsellors – involved in the divorce industrial complex and yet they play a very significant role, particularly in high conflict separation and custody disputes.

Asperger's is characterised by impaired social interactions, restricted patterns of interests (and preoccupation with a single subject), restricted intonation and motor clumsiness. In relationships Asperger's sufferers need considerable time out and find living with someone difficult; they cannot read others' emotions well and react badly to demands being made on them. People with Asperger's can be extremely intelligent, articulate and successful in their careers, while at the same time being very poor parents who will often neglect their children and expose them to risk, to the extent of abusing them, albeit without malevolence. Their partners can appear emotional and will report scarcely credible stories of abuse and bizarre behaviour,

but will not be believed. For this reason the symptoms of low self-esteem, depression, anxiety and lethargy which are often seen in the partners of men with undiagnosed Asperger's are referred to as Cassandra Syndrome.[371]

The following features are characteristic of post-separation conflict where one partner has Asperger's:

- High levels of conflict;
- A rigid approach to contact by the Asperger parent;
- Custody cases marked by a lack of trust between the parents;
- A high level of anger and a willingness to engage in repetitive litigation;
- Lawyers whose representation of their clients adds additional and unnecessary conflict to the proceedings;
- Mental health professionals whose interaction with parents, children, lawyers or the Court system exacerbates the conflict;
- Court systems in which procedures, delays or errors cause unfairness, frustration or facilitate the continuation of the conflict.[372]

[371] Cassandra was the Trojan daughter of Priam and Hecuba; she was given the gift of prescience by Apollo but cursed so that no one would believe her.
[372] See Sheila Jennings Linehan, *High conflict and Asperger's syndrome*, National Autistic Society, http://www.nas.org.uk/nas/jsp/polopoly.jsp?d=364&a=8122

It is often the other partner reacting inappropriately (but innocently) to an undiagnosed condition which can exacerbate conflict: the rather detached approach of an Asperger's sufferer to parenting and their failure to fulfil the parenting role set by the other parent can lead to (entirely justified) fears of neglect while other behaviours can resemble stalking, leading to allegations of harassment. Conventional counselling can make matters worse, and it is time that marriage counsellors started screening for Asperger's. Implacably hostile mothers will also sometimes jump on the 'Asperger's bandwagon' and it is important to distinguish this from the real thing. Radical feminist groups who want to prevent all contact between fathers and their children are also clambering onto this bandwagon, presenting entirely normal behaviour by fathers fighting for contact as evidence of Asperger's.

Where there is genuine Asperger's the mother is more likely to seek help and support than to prevent contact entirely, and implacable hostility will be absent.

Arrangements such as parenting plans cannot be applied to Asperger's patients who cannot live their lives according to schedules and have little sense of time. Thus post separation Asperger's sufferers are poor at sharing co-parenting and will, for example, arrive late to collect their children or forget when and where they were due to meet, and be unaware that this can cause the other parent irritation; this will lead to anxiety, frustration and anger in the parent without Asperger's, and because the same problems are continuing after separation as existed before, the unaffected parent can come to feel trapped. The non-Asperger's partner will try to compensate by negotiating and making plans, but this is not possible with someone who

cannot negotiate or make plans themselves. An additional problem is that the children of the marriage (usually the males) will often be affected as well.

There are very few precedents in this area, though you can always search Bailii for the most recent. Consider, for example, **Re P-B (A Child) [2006] EWCA Civ 1016** in which a child with leukaemia was taken into care because his Asperger's mother was unable to provide specialist medical care for him, though she was allowed to keep another, healthy, child.

If you feel you need more advice on this disorder look at the website of Families of Adults Afflicted with Asperger's Syndrome (**www.faaas.org**) which provides much information on this unique disorder and how it impacts on family life.

12.4.7. General advice

If you have any diagnosed mental condition such as a bipolar disorder or depression (not uncommon in the circumstances) you are advised to disclose it to the Court. You will be taking a gamble, but a reasonable judge will credit you with being honest and being brave enough to disclose something your former partner will certainly try to use against you. You must ensure that the Court makes clear your condition cannot be mentioned to any third party outside the Court. Bear in mind that if you inform your solicitor or barrister of any condition (if you are foolish enough to use them) they will be obliged to disclose it to the Court and to the other side; their first duty is to the Court and not to you.

There is no shame in mental illness, and if your ex tries to use it against it you they are appealing to the assumption that the Court shares their prejudice. The Court may not respond too kindly to that. Keep taking your medication, keep going to whatever treatment or therapy has been prescribed and make sure the Court knows you are always doing the right thing. And try to avoid further stress (!), particularly if your disorder is stress or trauma related. In the context of family litigation that means taking regular time out, participate in sport, go for a walk/run/cycle ride, etc. Take up a creative hobby like amateur dramatics or painting.

12.4. Cases

Non-Molestation Orders

Grubb v Grubb [2009] EWCA Civ 976

Occupation Orders

B v B (Occupation Order) [1999] Fam Law 208

S v F (Occupation Order) [2002] 1 FLR 255

Section 91 Orders

Re F (Minors) (Contact: Restraint Order) [1995]
B v B [1997] 1 FLR 139
Re M (Section 91(14) Order) [1999] 2 FLR 553
Re P (Section 91(14) Guidelines) [1999] 2FLR 573 CA
Re C (Prohibition of Further Applications) [2002] EWCA Civ 292
Re G (A Child) [2003] EWCA Civ 489
DJ v MS [2006] EWCH 1491 (Fam)

Re S (Children) [2006] EWCA Civ 1190
Stringer v Stringer [2006] EWCA Civ 1617
Re G [2008] EWCA Civ 1468
Re C (A Child) [2009] EWCA Civ 674
Re G (A Child) [2010] EWCA Civ 470
Re H (A Child) [2010] EWCA 1296
Re K (Children) [2010] EWCA Civ 1365

Implacable hostility

Re D (A Minor) (Contact: Mother's Hostility) [1993] 2 FLR 1

Re C (A Child) [2006] EWCA Civ 235

CHAPTER 13: ENFORCEMENT

Any court that does not enforce its own orders is a sham.

Lord Filkin, Minister for the Family Courts, January 2004

13.1. The Old Situation

13.1.1. The problem

A majority of the orders made in the Family Courts, and especially those for contact, are ignored to some extent by the resident parent and more often than not with impunity. There are many reasons for this, including the financial incentive of increased maintenance payments through the CSA/CMEC.

A 2008 survey of legal professionals by law students at Cardiff University[373] showed overwhelming support for the view that contact was not adequately enforced; enforcement was dismissed as 'an absolute joke'. One solicitor with over 27 years' experience had only seen 2 orders enforced. In 2010 a mere 55 Enforcement Orders were made.[374] Family law judges long excused this situation by complaining that they had no sanctions beyond fines and committal with which to enforce compliance. We have already quoted Mrs Justice Bracewell in

[373] Dyer, C., McCrum, S., Thomas, R., Ward, R. & Wookey, R., *Enforcement of Contact Between Children and Non-Resident Parents*, Cardiff Law School: Family Law Research Project, August 2008, http://www.law.cf.ac.uk/alumni/studentproject.pdf

[374] Unpublished data from Her Majesty's Court Service FamilyMan case management system.

V v V [2004] EWHC 1215 (Fam) in which she listed the four options then available:

1. Commit the parent to prison for up to two years or make a suspended order for imprisonment;

2. Impose a fine;

3. Transfer residence to the other parent;

4. Give up: make an order for indirect contact or no order at all.

Most judges refuse the first three options because, they say, it is not in the best interests of the children and where respondents are implacably hostile to the idea of contact even committal is not necessarily effective. In far, far too many cases the fourth option is used. As a result a third of children lose all contact with their fathers following family breakdown.[375]

The Children and Adoption Act 2006 was designed to rectify this problem by introducing more flexible powers to facilitate contact and to enforce Contact Orders made under the Children Act 1989; since December 2008 the implementation of Part 1 of the Act has provided the courts with the additional sanctions for which they have been clamouring for years. Half of the lawyers surveyed in the Cardiff study regarded the proposals with pessimism, however, and were not convinced that the courts would make use of the measures available. In 2010 a thousand applications were made for Enforcement Orders, but only 55 were made; in the same year a derisory 4 orders were made for compensation – clearly the failure to enforce orders has little to do with the availability of sanctions.

The Court must consider the reasons why an order is being disobeyed, why there is hostility and whether it is 'implacable'; see V v V [2004] EWHC 1215 (Fam). The respondent can apply for relief from any sanction the Court may impose, but must supply evidence for the reasons given; under **Rule 4.6** of the Family Procedure Rules 2010 the Court must consider all circumstances. In Re P (Contact: Discretion) [1998] 2 FLR 696 Wilson J outlined three ways in which hostility to contact might arise and how it should be dealt with:

1. There are no rational grounds: the Court should only refuse contact where there is serious risk of emotional harm to the child.

2. The grounds are sufficient to displace the presumption in favour of contact: contact should not be ordered.

3. The arguments are rational but not decisive: in such a case the hostility itself may be of determinative importance when measured against the child's best interests.

Re K (Children: Committal Proceedings) [2003] 2 FCR 336 established that imprisonment would infringe the human rights of a mother and her child and that committal must be justified under Article 8(2) (the right to freedom from state interference in one's private life). Other remedies such as further Contact Orders, fines, family therapy and transfer of residence must be tried first (Re M (Contact Order: Committal) [2004] EWCA Civ 1790).

[375] Press release issued by Mishcon de Reya, November 2009

A parent's Article 8 rights may be restricted where the interests of the child so require; where there is conflict the child's right is paramount; see Yousef v Netherlands [2003] 1 FLR 210 and Hoppe v Germany [2003] 1 FCR 176.

Again we are forced to the conclusion that the Family Courts are averse to enforcing contact and that shared residence with defined contact is the only application worth making. Despite the clear evidence that huge numbers of orders are ignored, fewer than 2% of resident parents defaulting on Contact Orders face any penalty.[376]

As we have shown, the excuses for ignoring orders are legion: your child is ill / doesn't want to see you / is going to a party; I got the dates mixed up / had to leave the house at short notice, etc, etc, etc. If you have played the game for a while and it isn't working sooner or later you will have no option but to return to Court, bearing in mind that this will aggravate the other parent further (as if they didn't expect denying you contact would provoke you). You will need to go to Court as soon as possible after contact is denied and tell the clerk you wish to see the duty judge for an *ex parte* emergency hearing (without your children's other parent and their legal team present); you must be prepared to hang about all day.

The courts are extremely reluctant to enforce an order which is being ignored (though they can if they want) and you will almost always have to make an application for enforcement; inevitably the judge will want to re-examine the case to see what has changed, and what action is now appropriate. There may well be another CAFCASS report and new directions. You will probably be given a date for an *inter partes* hearing (with your children's other parent and their legal team present).

Ultimately your only recourse is to go back to Court again and again, demand enforcement of the Contact Order, demand sanctions under the Children and Adoption Act, demand penal notices, demand committal or transfer of residence. But you have to do these things in the right order, and at the right time; if you try to go too far, too fast, you will come across as vindictive, and the Court won't like that, and they may even consider you vexatious. Each time the Court will want to allow time to determine whether or not the order is working, perhaps 6 months. Years can pass by like this very easily.

Note: that the legislation provided under the Children and Adoption Act 2006 is now incorporated into Section 11 of the Children Act 1989.

13.1.2. Penal notices

Let us consider first the old 'Penal Notice' which a court can apply to the terms of a Contact Order and which theoretically enables punishment to be imposed on the parent who disregards it, though these are rarely enforced. A penal notice cannot give the power of arrest (there is no power in the Children Act to include a power of arrest); they are often little more than an idle threat. If a Contact Order has a penal notice attached and the order is broken then the remedy is to apply for committal. However, following Re K [2003] 2

[376] Harriet Harman in written answer to John Hemming, Hansard, 4 July 2006, http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060704/text/60704w1420.htm#06070491000037

FCR 336, judges consider the committal of a resident parent to prison to be contrary to the best interests of the child.

You will simply need to return to Court again. This is a lengthy process which can take many years and numerous hearings, but you should persevere; many parents give up at the point where they are about to be successful. Be aware that each subsequent Contact Order can reduce the level of contact.

The only way contempt of an order can result in imprisonment is if it was made clear that this would result in imprisonment by means of a penal notice. The order must carry this notice:

> *If you the within named do not comply with this order you may be held to be in Contempt of Court and imprisoned or fined.*

The party to whom the order applies can make an Undertaking, but the Court can refuse to accept it. If the Undertaking is breached the Court may commence contempt proceedings.

The courts are aware of the campaigning against them and the growing cognizance the public now has that they do will enforce their own orders. Consider the statements made by two judges recently. The first is in A v N (Committal: Refusal of Contact) [1997] 1 FLR 533 (CA),

> *There does come a limit to the tolerance of the Court to see its orders flouted by mothers even if they have to care for their young children. If she goes to prison it is her fault, not the fault of the learned judge who did no more than his duty to the child which is imposed upon him by Parliament.*

The second from **Burgess v Stokes [2009] EWCA Civ 548**,

> *The days are long gone when mothers can assume that their role as carers of children protects them from being sentenced to immediate terms of imprisonment for clear, repeated and deliberate breaches of Contact Orders.*

13.2. The 2006 Act

13.2.1. Warning notices

Since the introduction of the **Children and Adoption Act 2006** it has been possible to attach a 'warning notice' to an order, and it is likely that warning notices will be used far more often and earlier than the older penal notices. The warning notice must apply both to the respondent and to the applicant. Warning notices are covered under **Rule 12.33** of the Family Procedure Rules 2010. Three types of warning are possible,

- A warning (in accordance with Section 13 of the Children Act) that where a Residence Order is in force, no person may cause the child to be known by a new surname or remove the child from the United Kingdom without the written consent of every person with Parental

Responsibility for the child or the leave of the Court. This does not prevent the removal of the child, for a period of less than 1 month (28 days), by the person in whose favour the Residence Order is made.

- A warning that it may be a criminal offence under the Child Abduction Act 1984 to remove the child from the United Kingdom without the leave of the Court.

- Advice that any person with Parental Responsibility for the child may obtain guidance on what can be done to prevent the issue of a passport to the child. They should write to UK Passport Agency, Globe House, 89 Eccleston Square, London, SW1V 1PN.

Breach of a warning notice will result in a range of sanctions beginning with an unpaid work requirement. Further breach may result in an additional Enforcement Order, an extension of the Enforcement Order to make the work requirement 'more onerous', a fine or committal to prison.

Breach of an order can only result in committal to prison if this is made clear to the respondent by attaching a warning notice to the order (older orders may already have a penal notice attached), informing the recipient that breaching the order may result in a fine or committal to prison.

There is no retrospective appending of warning notices to existing orders, but transitional provisions in the Act allow parties to apply to have a warning notice appended to an existing Contact Order. This means that if the Contact Order was made before implementation of the Children and Adoption Act 2006 on 8th December 2008 and you want to take advantage of the new sanctions available you will first have to apply to the Court to have a warning notice attached. More cost and more delay. The Court does not have discretion to refuse such an application, since the attachment of a warning does not imply that the Court has found the order to have been breached.

Under **Section 3** of the Act all Contact Orders made or varied *after* the implementation date will automatically have a warning notice attached to them, advising of the consequences of not complying with the order. This is an improvement on the earlier arrangement in which having a penal notice attached to an order required an additional application.

You make an application to have a warning notice attached to an existing order on the application **Form C78**, see below.

The statutory C43 (Contact Order) form has been amended to provide for inclusion of the text of the warning notice.

13.2.2. Contact activities

When considering whether or not to make a Contact Order, the Court may direct parties to undertake a 'contact activity' and attach this as a condition to the order. These activities must be regarded not as sanctions with which to punish an intractable parent but as tools to get contact working for the benefit of the child. There are three types of contact activity in which the Court may require parents to participate:

- Attending information/assessment sessions about mediation; this programme involves a one-off information/assessment meeting.

- Attending Parenting Information Programmes (PIPs); these are designed to support attending parents with information on parenting following separation, how it can affect them and their children and how to change things for the better. The intention is to encourage safe, beneficial contact between children and their parents.

- Attending programmes aimed at addressing violent behaviour. These intensive interventions are designed to challenge and address participants' violent and abusive behaviour. The programme is an intensive intervention (of about 60 hours) and seeks also to engage with victims and (if any) current partners.

The Court cannot require you to undergo medical or psychiatric examination, assessment or treatment as part of a contact activity, and it cannot require you to take part in mediation.

A contact activity direction can form part of a final order, so the effect of the activity in facilitating contact need not be monitored. The court must ensure the child's welfare is always the paramount consideration.

Before making such an order the Court must consider the availability of the contact activity, the accessibility for the parent, the suitability of the parent, and the likely effect of participating. The person providing the activity must be named in the order. According to the Family Justice Council availability of these activities will be subject to a 'postcode lottery' in the same way that other services provided by CAFCASS and contact centres are.[377]

From April 2010 litigants have not had to pay for these programmes, presumably to encourage greater use.[378] The £80 cost of an information session about mediation will be covered by the Legal Services Commission, and the £200 per party cost of a parenting information programme will be covered by the Department of Education (or whatever it's calling itself now); both parties will be required to participate, though not necessarily together. Only one party will be required to attend a domestic violence (DV) programme, if they have admitted to DV or been found through a finding of fact hearing to have been a perpetrator. The £2,500 cost of such a programme will also be covered by the Department of Education. Any victim of DV will be offered support services.

13.2.3. PIPs

The Separated Parents Information Programmes (PIPs) are awareness programmes which a court will direct parents to attend where a CAFCASS officer has recommended accordingly. They are becoming increasingly popular and referrals rose from 900 in 2008/09 to 13,178 in 2010/11. PIPs are run by providers such as Relate. Both parents are expected to attend the sessions, but not together. They are

[377] http://www.communitycare.co.uk/Articles/2008/12/09/110200/family-justice-council-postcode-lottery-risk-for-contact-activities.html

[378] See the Explanatory Memorandum to the Children Act 1989 (Contact Activity Directions and Conditions: Financial Assistance) (Revocation and Transitional Provision) (England) Regulations 2010, 2010 no. 690, http://www.opsi.gov.uk/si/si2010/em/uksiem_20100690_en.pdf

'aimed at improving parents' abilities to put aside their differences and limit the negative impacts that their divorce or separation can have on their children by improving communication; helping them to make joint parenting decisions and to see the separation through the eyes of their children'. They are based, therefore, on the presumption made by those who work in the system that disputes over residence and contact are the fault of both parents.

PIPs are run over two sessions and last a total of four hours. Parents are initially asked to watch a DVD made by young people which charts the course of a case over 6 months. Parents are then asked to discuss a prepared scenario and to consider it from the viewpoints of the mother, father and children. Finally parents are asked to look at the emotional effects divorce and separation can have and at the options for moving forward.

The provider only reports your attendance back to CAFCASS and does not assess your responses to the programme.

13.2.4. Enforcement

If this is the first breach of the order made by your children's other parent it may be valuable to write to them in the first instance pointing out that they are in breach of the order; say that you will proceed to Court if the order is not adhered to, and send a copy of the letter to the Court. If it does go back to Court you will at least be able to show that you have tried to resolve the issue reasonably, attempting to have your ex committed isn't likely to improve relations between you.

Note: that you can only apply to a court for enforcement of contact where a Court Order has been made for contact; you cannot ask the Court to enforce a private agreement for contact, nor can the legislation be applied to the enforcement of Residence Orders.

If the other parent is publicly funded the threat of Court may not concern them, as they know they can keep you going back there for years if they want to. Challenge their funding.

If there is no compliance or if a Contact Order is breached without reasonable excuse you will need to make an application for enforcement using **Form C79** which was introduced at the same time as implementation of Part 1 of the Act. If the case comes back to Court (for example on application for a variation) the Court must add a warning notice to the Contact Order.

To qualify to make the application you must be the resident or contact parent, another adult with PR for the child, an adult with whom the child is living, or the child himself.

The case is dealt with under **Section 11J** of the Children Act. The Court must be satisfied to the 'beyond reasonable doubt' standard of proof that the other party failed without reasonable excuse to comply with the Contact Order; it may then make an Enforcement Order under the Criminal Justice Act 2003 [379] imposing an '**unpaid work requirement**' of between 40 and 200 hours on the party (this used to be called Community Service).

[379] http://www.opsi.gov.uk/acts/acts2003/ukpga_20030044_en_1

The Court must also be satisfied that there was no reasonable excuse for failing to comply with the order. A reasonable excuse might be a sudden medical emergency involving the respondent or the child, a car breaking down or train being cancelled, or a fear of violence at handover. The burden of proof is on the respondent to demonstrate the truth of their excuse, and the standard of proof is the balance of probabilities.

The Court is required to satisfy itself that the Enforcement Order is necessary to ensure compliance and has a reasonable chance of success. The unpaid work must be available locally and it must not interfere with the person's work, education or religious observance. How the unpaid work impacts on the welfare of the child must also be considered, but the child's welfare is not, in this instance, the paramount principle. The courts remain squeamish, however, and in 2010 only 55 such orders were made.

The Court must attach a Warning Notice to the Enforcement Order warning of the consequences of failing to comply; if the order is not carried out it can be increased to a maximum of 200 hours and a fine can be imposed. Continued breach may result in a prosecution for Contempt of Court.

The Court will ask the CAFCASS/CAFCASS Cymru officer to monitor compliance with an order for unpaid work and failure will be reported to the Court. The work requirement itself must be monitored by a reporting officer who must warn a party in breach of an Enforcement Order without reasonable excuse. He may also report first-time breaches to CAFCASS.

If the breach is not the first within the previous 12 months, he *must* report it to CAFCASS. The Court will very, very rarely enforce an order unless you specifically apply for it to be enforced on an additional **Form C79**. If it sees fit, the Court can also order the parties to attempt to resolve their differences through mediation. If in the substantive proceedings the child was represented by a Children's Guardian, the guardian is not automatically served with the application to enforce. However, an application for a fresh appointment may be made to the Court.

Applications for enforcement must be treated by the Court as family proceedings and thus are held in chambers.

The Court's aim is not to punish an uncooperative parent but to get contact working. If contact starts again while the unpaid work is being carried out the Court is likely to end the order, provided it thinks contact will continue.

13.2.5. Compensation

Where a Contact Order has been breached without reasonable excuse and breach has been proved beyond reasonable doubt, the Court may on an application award financial compensation from one party to another; for example, if the cost of a holiday or flight has been lost as a result of a breach of a Contact Order. This is enabled by **Section 11O** of the Children Act.

The Court may not make the order if the respondent has a reasonable excuse for breaching the Contact Order. Once again the burden of

proof is on the respondent, and the standard of proof is the balance of probabilities. The Court must ascertain the impact of this on the child's welfare and CAFCASS has responsibility for providing that information.

If you have suffered actual financial loss you must apply to the Court for a financial compensation order in respect of that loss; again you make an application using **Form C79**. You will find the Family Courts don't take very seriously any claim that obstruction of contact has left a father financially disadvantaged: in 2010 the courts made a total of 4 such orders.

13.2.6. The role of CAFCASS

The new provisions impose additional responsibilities upon CAFCASS under **Section 11E** of the Children Act:

The Court may ask a CAFCASS (or CAFCASS Cymru in Wales) officer to provide information in the process of making a contact activity. Before the Court can order the activity it must first determine from CAFCASS,

- that the proposed activity is appropriate to the circumstances;
- that the person named in the order as the provider is suitable to provide the activity; and
- that the person to whom the order applies can reasonably be expected to travel to the activity.

CAFCASS must also advise the Court of the likely effect that making the direction or order will have on the person affected, including possible conflicts with religious beliefs and interference with work or educational commitments.

CAFCASS must also advise the Court on the local availability of unpaid work which is administered by the National Probation Service (NPS). The CAFCASS officer may be required to discuss aspects of the case with an officer from the National Probation Service, but must not disclose details of your case to the NPS without leave of the Court. If an Enforcement Order is made CAFCASS must liaise with the NPS who will monitor it to ensure the work requirement is carried out. If the order is not complied with, or the party is for any reason unable to carry out the requirement, the NPS will report this to CAFCASS who will report to the Court. A new **Practice Direction** ensures that the Court will give leave accordingly for disclosure in order that the officer will not potentially be in contempt.

- Under **Section 11G** of the Children Act the Court may ask a CAFCASS (or CAFCASS Cymru in Wales) officer to monitor compliance with contact activity directions and contact activity conditions. They will be expected to monitor the programmes and to report back to the Court on the effects, whether beneficial or not.
- The Court may also ask the CAFCASS/CAFCASS Cymru officer to monitor compliance with a Contact Order and to report back to the court.

CAFCASS will be expected to make the initial suggestion that a contact activity is appropriate and to incorporate the recommendation into the initial assessment it makes to the Court. In practice you may need to remind your CAFCASS officer about this.

Although under these rules CAFCASS are expected to monitor contact, they have never before done this and are unlikely to comply, given their considerable backlog and claims that the service is already over-worked and under-resourced. The onus will still fall on you to inform the Court if contact is not taking place or if other directions are not complied with.

It has been agreed with the President of the Family Division that the new provisions should not be used in 'consent order' cases where proceedings have ended. Instead their use will be limited to those cases where the issue of contact has remained in dispute during proceedings and where a trial and judicial determination of contact have taken place. For example, where one party remains resistant to contact the Court may consider that the imposition of a monitoring requirement is appropriate. Unlike the situation with Family Assistance Orders the consent of the parties is not required. CAFCASS may also transfer this duty to a Family Support Worker.

Under **Section 11H** of the Children Act, if it deems it appropriate, the Court may set a further date for a review hearing, preferably before the same judge. CAFCASS will be expected to monitor compliance with the Contact Order by means of phone calls to the adults and interviews with the children if they are competent. CAFCASS should make recommendations to the Court on how contact is to be monitored so that this can then be incorporated into the order. If CAFCASS then fails to monitor the contact they will be in breach of the order. Where compliance is satisfactory it may be possible for CAFCASS to reduce the frequency of monitoring. The Court may not order CAFCASS to monitor compliance for longer than 12 months.

The Court can instruct CAFCASS to provide a written report on the outcomes of the order either at the end of the monitoring process or before if compliance is not satisfactory. If your ex is not complying, or is introducing minor or petty infractions, you must return to Court before this becomes a pattern; don't let CAFCASS persuade you that anything less than complete compliance is acceptable. The Court may then decide it is necessary to bring forward the review hearing, and CAFCASS will need to inform both parties and the judge how best to monitor any compliance which is taking place while the Court considers how best to proceed.

If you make a C79 application for enforcement the Court will send CAFCASS a copy of the application so that they can undertake updating screening checks with the relevant local authority and the police and produce a **Schedule 2 Letter**.

Some applications will be made as a result of a non-compliance notification from CAFCASS, while others will arise in cases where CAFCASS has not recently been actively involved. In either case, CAFCASS must notify the Court promptly as to the outcome of the checks, together with any other information they request. The Court has discretion to join the child as a party to enforcement proceedings; the child is not automatically a party even if he was a party to the original proceedings which led to the making of the breached order.

CAFCASS may be asked to advise the Court on whether the child should be joined as a party. In practice it will seldom be necessary, and CAFCASS Legal can advise in difficult cases.

These provisions are relatively new, which means that there are few legal precedents involving them, and little advice we can usefully give on using them. It is important that they are used, and you must ensure that if they are CAFCASS keeps to its side of the bargain; be careful, though, that in making these applications you do not come across as malicious. It may well be that these sanctions are simply a cynical ploy to reduce repeat litigation while increasing fees and assisting the Family Courts to come closer to full self-funding; they may prove ineffective, with the result that they will merely delay proceedings further.

13.2.7. Filling out Form C78

This form is used to make an application to have a Warning Notice attached to a Contact Order

1. Enter the name of the Court and the case number if you know it.
   Enter your full name and the name(s) of your child(ren).
   Enter the date of the Contact Order to which you want the warning notice to apply. You must attach a copy of this order.

2. Enter your name (again), date of birth and sex.
   Enter your address, home and mobile telephone numbers.
   If you are using a solicitor, provide his name, firm, address and telephone and DX numbers.

3. Enter the names, dates of birth and sex of all children affected by the Contact Order. If there are more than 4 children photocopy the sheet and fill it in.
   Give your relationship to each child.

4. Enter the name, date of birth and sex of the respondent.
   Give their relationship to each child.
   If they have a solicitor working for them give details as above. These should be on any correspondence you have had from them.

5. If there are any ongoing cases other than the Contact Order give details of them here.
   Give the name of the child(ren) affected.
   Give the name of the Court and the case number.
   Give the names of the CAFCASS officer and the solicitor if the child has separate representation.

6. Print your name; sign and date the form.

7. Tick the appropriate box regarding whether you need an interpreter; enter the language in the box below. If you are hearing impaired and need a signer, put it in this box.
   Tick the appropriate box regarding whether you need assistance or special facilities because you are disabled; enter the details in the box below.
   Enter details in the next box regarding additional security arrangements if you think you are at risk of violence from the respondent, etc.

Before you put everything into the envelope and seal it, tick the boxes on the final page. Check that you have:

- Included a copy of the existing Contact Order;
- Signed and dated the form;
- Attached the sheets of additional children if you have more than four;
- Attached the sheets of additional respondents if there are more than two;
- Attached the sheet of additional on-going cases if there is more than one;
- Included the requisite **fee**; if you are exempt you must complete and attach **Form EX160**.

13.2.8. Filling out Form C79

This form is used:

- if you wish to apply for an Enforcement Order;
- if you wish to amend or revoke an existing Enforcement Order;
- if the Enforcement Order has been breached and you want the Court to take action; or
- if you wish to apply for compensation for financial loss.
- It can also be used by the person to whom the Enforcement Order applies:
  - if they want the hours in the order to be reduced;
  - if they want the time allowed for the work requirement to be extended.

Completing the form:

1. Enter the name of the Court which issued the Contact Order, the case number and date.
   Enter your name (if you were the applicant) and the name(s) of your child(ren).
   Make sure you attach a copy of the Contact Order.

2. Tick the appropriate box for the order for which you wish to apply.

3. Enter your name (again), date of birth and sex.
   Enter your address, home and mobile telephone numbers.
   If you are using a solicitor, provide his name, firm, address and telephone and DX numbers.

4. Enter the names, dates of birth and sex of all children affected by the Contact Order. If there are more than 4 photocopy the sheet and fill it in.
   Give your relationship to each child.

5. Enter the name, date of birth and sex of the respondent.
   Give their relationship to each child.
   If they have a solicitor working for them give details as above. These should be on any correspondence you have had from them.

6. Give the names and addresses of anyone else who should be informed of the application.

7. Explain why you are making the application:

   a) If you are applying for an Enforcement Order give brief details of the Contact Order and how and when it broke down. State how long it has been since you saw your children. Give brief details of your efforts to restore contact, e.g. the number of hearings, etc.

   b) If you are applying for compensation for financial loss enter the total amount you are claiming. Explain briefly how this loss has come about, e.g. a cancelled flight or holiday. You will need to provide evidence of the loss.

   c) If you are applying for the Court to take action because an Enforcement Order has been breached give brief details of the order and how it has been breached. You should attach a copy of the Enforcement Order. State which court made the order and when. Give the name of the local justice area responsible for enforcement.

   d) If you wish to amend or revoke an order this is likely to be because contact is now taking place. State how the circumstances have changed, how much contact is taking place, and why you want to revoke or amend the order. Give details of the justice area, and complete the information about hours if you know it.

8. If there are any on-going cases other than the Contact Order give details of them here.
   Give the name of the child(ren) affected.
   Give the name of the Court and the case number.
   Give the names of the CAFCASS officer and the solicitor if the child has separate representation.

9. Print your name; sign and date the form.

10. Tick the appropriate box regarding whether you need an interpreter; enter the language in the box below. If you are hearing impaired and need a signer, put it in this box.
    Tick the appropriate box regarding whether you need assistance or special facilities because you are disabled; enter the details in the box below.
    Enter details in the next box regarding additional security arrangements if you think you are at risk of violence from the respondent, etc.

Before you put everything into the envelope and seal it, tick the boxes on the final page. Check that you have:

- Included a copy of the Contact Order;

- Included a copy of the Enforcement Order;

- Provided copies of the application and all documents for all respondents and for CAFCASS;
- Attached receipts or other evidence of financial loss;
- Signed and dated the form;
- Attached the sheets of additional children if you have more than four;
- Attached the sheets of additional respondents if there are more than two;
- Attached the sheet of additional on-going cases if there is more than one;
- Included the requisite **fee**; if you are exempt you must complete and attach **Form EX160**.

Once you have completed the form a copy will need to be served on the respondent. It is likely that the Court will give directions for this, but given the nature of the application you are advised to have it served by a process server rather than serve it yourself and risk causing distress or a breach of the peace.

13.3. Cases

Re P (Contact: Discretion) [1998] 2 FLR 696
Re K (Children: Committal Proceedings) [2003] 2 FCR 336
Hoppe v Germany [2003] 1 FCR 176
Yousef v Netherlands [2003] 1 FLR 210
Re M (Contact Order: Committal) [2004] EWCA Civ 1790
V v V [2004] EWHC 1215 (Fam)
Burgess v Stokes [2009] EWCA Civ 548
L-W (Children) sub nom CPL (v) (1) CH-W (2) ML-W (3) EL-W (By their guardian) [2010] EWCA Civ 1253

CHAPTER 14: RELOCATION

> *These are the tides of chance and life and in the exercise of its paternalistic jurisdiction it is important that the Court should recognise the force of these movements and not frustrate them unless they are shown to be contrary to the welfare of the child.*

Lord Justice Thorpe[380]

14.1. Definitions

One in four separated mothers will relocate within 4 years,[381] and it is sadly the case that relocation is associated with poorer outcomes for children even within intact families.[382] In separated families relocation beyond a one hour drive is associated with very substantially reduced outcomes.[383] There is **no evidential justification** for the common judicial opinion that allowing the resident parent to relocate with the child is in the child's best interests.

Resident parents will often behave as if the other parent no longer exists. In this chapter we shall examine three common scenarios:

1. Your ex wants to move with the children to another part of the UK and this will cause problems with regular contact ('internal relocation');

2. Your ex wants to move with the children to another country ('removal from the jurisdiction');

[380] Payne v Payne [2001] EWCA Civ 166, 2 WLR 1826

[381] Data from the US in Ford, C. *Untying the relocation knot: recent developments and a model for change.* Journal of Gender and Law, 1997
[382] Humke, C. and C. Schaeffer, *Relocation: A review of the effects of residential mobility on children and adolescents.* Psychology: A Journal of Human Behavior, 1995
[383] Braver, S.L., I.M. Ellman, and W. Fabricius, *Relocation of children after divorce and children's best interests: New evidence and legal considerations.* Journal of Family Psychology, 2003

3. Your ex has snatched your children, or you fear s/he is about to (abduction).

First of all we need to make it absolutely clear what we are talking about by defining some other terms:

14.1.1. Habitual residence

The concept of a child's habitual residence is a hotly litigated issue largely because it is not defined in the Hague Convention. The rule was set by Lord Scarman in Regina v Barnet L.B.C., *Ex parte* Shah [1983] 2 AC 309, in which he said that the emphasis should be

> *not on intention or expectation for the future which is implicit in the idea of permanence, but on immediately past events, namely the usual order of the applicant's way of life and the place where in fact he has lived.*

This was the interpretation given by the Court in **Re H-K (Children) [2011] EWCA Civ 1100** in which an Australian couple who had come to Britain for only a temporary stay of one year were nonetheless considered to be habitually resident here for the purposes of the proceedings.

A further leading case is Friedrich v Friedrich, 983 F2d 1396, 1401 (CA 6, 1993), in which the US Court of Appeals for the Sixth Circuit set out the following guidelines:

- a person can have only one habitual residence;
- habitual residence is not determined by a child's citizenship;
- habitual residence depends on a child's customary residence prior to removal; the Court must look back at where the child was living at the time of removal, not forward to where the child is to live in the future;
- habitual residence can only be altered by a change of location and by the passage of time, not by changes in parental affection and responsibility; the change in location must occur before the questionable removal.

In the further case of Feder v Evans-Feder, 63 F3d 217, 224 (CA 3, 1995) the Court held that: 'A child's habitual residence is the place where he or she had been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective'.

Consider also the judgement in Dickson v Dickson 1990 SCLR 692:

> *A person can, we think, have only one habitual residence at one time and in the case of a child, who can form no intention of his own, it is the residence which is chosen for him by his parents. If they are living together with him, then they will have their residence in the same place. Where the parents separate... the child's habitual residence cannot be changed by one parent unless the other consents to the change. That seems to us to be implied in the Convention.*

This definition establishes a substantial distinction between cases involving relocation abroad and run-of-the-mill contact cases.

14.1.2. Settled

As we shall see below, the law frequently refers to a child who has been removed from the jurisdiction as being '*settled* in his or her new environment'. This is a very important concept in terms of changing the habitual residence, and has two components:

- The child must be *physically* integrated into the new community, with a new home, with new or existing relatives, attending a new school, making new friends, etc.

- The child must be *emotionally* and *psychologically* secure and stable within the new environment.

A child is usually deemed to be 'settled' after a year in the new environment; once a child is 'settled' it is much more difficult, if not impossible, to repatriate him. The term is used in a specifically legal context; thus a child can be *unsettled* psychologically (as we'll see), but nevertheless sufficiently *settled* to satisfy the legal definition.

14.1.3. Abduction

Child abduction is the removal by one parent of a child under the age of 16 across an international border without the knowledge or consent of the other parent. Removal of a child across national borders within the United Kingdom does *not* constitute abduction. The new C1A form does not provide a clear definition of domestic abduction, which means that allegations of abduction will doubtless sometimes be made which do not in fact constitute abduction under the law.

Child abduction is a criminal offence under the Child Abduction and Custody Act 1984 which brings the Hague Convention into UK law. There are in fact several Hague Conventions; the relevant ones are the 1980 Convention on the Civil Aspects of International Child Abduction, the 1993 Convention on Inter-Country Adoption and the 1996 Convention [384] which provides for the co-ordination of legal systems and for international judicial and administrative cooperation and which came into force in June 2010.

14.2. Internal Relocation

14.2.1. Legal precedents

We must distinguish between a parent who wishes to move house within the UK jurisdiction, and one who wishes to move their child outside the jurisdiction to a foreign country.

[384] The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, http://www.hcch.net/index_en.php?act=conventions.pdf&cid=70

It may be that you have spent years – and many thousands of pounds – building up contact to a reasonable level, only to be set back to square one and a couple of hours a fortnight by a former partner who decides to up sticks and take your child three or four hundred miles away. If there are orders already in place any move may very likely breach them and the relocating parent should apply for a Specific Issues Order.

It is very difficult to prevent internal relocation, though the Court may, under **Section 11(7)** of the Children Act, impose conditions on any order already made under Section 8 for residence, contact, prohibited steps or specific issue. These conditions can include restricting a parent to a geographical location.

The leading case for relocation within the UK used to be Butler-Sloss LJ's decision in Re E (Residence: Imposition of Conditions) [1997] 2 FLR 638. The lower court judge had imposed a condition restricting the children to residence at a named address unless agreed by the father or ordered by the court. The condition was overturned on appeal. Butler-Sloss said,

> *a condition of residence is in my view an unwarranted imposition upon the right of the parent to choose where he/she will live within the UK or with whom.*

Butler-Sloss ignored the obvious disastrous impact the decision would have on contact. More recent decisions have taken this into greater account. The Court's paramount consideration must always be the child's welfare.

In B v B (Residence: Condition Limiting Geographic Area) [2004] 2 FLR 979 a mother was prevented from relocating from the South of England to Newcastle. The case hung on the fact that contact would depend on the mother boarding a flight to London and that she had been consistently hostile to contact, misleading the Court on a number of serious issues. The move would not be in the child's best interests.

The leading precedent now is Re L (A Child) (Internal Relocation: Shared Residence Order) [2009] EWCA Civ 20, also reported as **Re T (A Child) [2009] EWCA Civ 20** in which a mother appealed a judge's decision to prevent her relocation from North London (the matrimonial home) to Chew Magna in Somerset (where the mother was living with her new husband), a distance of about 130 miles or 2 hours travel. The crafty judge achieved this, not by imposing conditions under s.11(7) but by varying the existing Shared Residence Order; (1) to extend the periods the child spent with her father at weekends 'from after school on Fridays until the beginning of the school day on Tuesdays on alternate weeks'; and (2) 'from after school on Tuesdays until the beginning of the next school day being the Tuesdays in the weeks following the Tuesdays in (1)'.

This was, according to Lord Justice Wall in the Court of Appeal, the first case regarding internal relocation where there was already a Shared Residence Order in place. The mother had previously been refused leave to move to Israel, and the father claimed that this was the latest in a series of moves to disrupt contact, which the mother denied. Refusing the move to Israel the judge had said,

> *part of (the mother's) motivation for the proposed move is to diminish greatly (the father's) relationship with their daughter*

and that it can be categorised properly as selfish. She did not see the need nor have any wish to discuss or involve (the father).

Wall found that, because an order for shared residence could already be made where there was substantial geographical distance between the parents (see **Re F (Shared Residence Order) [2003] EWCA Civ 592**), the fact that there was an existing Shared Residence Order was a factor but should not be the deciding one. The essence was to balance a parent's right to relocate against a child's best interests.

Wall found that the mother had not been truthful about her partner's work, and had then tried to conceal the untruth as 'a typographical error'. She had delayed telling the father of her intention to remove; she'd shown a 'lack of frankness' about a trip to Australia during which she and her partner were to marry; she had made a number of unilateral decisions regarding the daughter; her motivation in removing was substantially to diminish the father's relationship with his daughter and undermine the SRO, the purpose of which had been to ensure that neither parent was to be regarded as primary carer.

Wall decided to dismiss the mother's appeal on the grounds that the lower court judge's decision was not 'outwith the ambit of reasonable disagreement, or plainly wrong' (paragraph 62). The SRO remained in place, providing the father with midweek care, and making removal impossible; but Lord Justice Wall added this postscript, which all warring parents should heed:

The father and the mother share equal responsibility for this state of affairs, and the father in particular should not regard the outcome of this appeal as a victory: it is, in reality, a defeat for both parties, who have been unable to resolve their differences by sensible agreement. They are fortunate in having a daughter whom they both love and who loves them. Each must fully appreciate the role the other has to play in L's life, and the current hostility between them must cease. Otherwise, in my judgment, the emotional damage to L will be serious and lasting.

In **Re F (Children) [2010] EWCA Civ 1428** a mother proposed to relocate 4 children aged 9, 11 12 and 14 from Cleveland to the Orkneys. Two children favoured the relocation, two opposed it. The recorder refused the application, describing the location as one of the remotest inhabited places in the UK and the application as 'truly exceptional' and not in the children's best interests. The Court of Appeal unanimously dismissed the appeal, quoting Re L, and considered that the recorder had been wrong to allow the appeal.

14.2.2. Prevention

If you do not fight relocation you effectively relinquish any right to be regarded as a resident parent. If you do nothing, you will be in a very weak position should you later try to apply for contact, and shared residence will never be a possibility.

One option, used in Re E and Re T above is for the Court to impose a condition under Section 11(7) of the Children Act; this is a matter for the discretion of the judge and only to be used in exceptional circumstances. The only situation in which such an application is likely

to be allowed is where there is already an established history of obstructed contact in which the intention to move is only the most recent tactic.

The courts now tend to frown on the imposition of conditions, however, and the preferred option, as expressed in Re F, is to apply for a Prohibited Steps Order.

The same principle of 'detrimental impact' which applies in leave to remove cases also applies in internal relocation cases; this is discussed below.

The appropriate decision, in cases where the Court has concerns about the ability of the resident parent to be a 'satisfactory carer' would be to transfer residence, but in the absence of such concerns no conditions should be imposed.

Your best option very often will be to move as well, though this can then lead to an unseemly and expensive chase around the country.

14.3. External Relocation

14.3.1. Consequences

Relocation – whether internally within the jurisdiction or externally to a different jurisdiction – is akin to taking a child into care or adoption in public law: the child is effectively transferred from one family to another. It is estimated that contact between the child and the 'left behind' parent in between 40% and 50% of leave to remove cases breaks down within 2 years of relocation; overall figures are not available, but it is certainly well over half.

Two studies into leave to remove cases were conducted in 2009. The first was by Professor Patrick Parkinson of the Faculty of Law, University of Sydney, in collaboration with a team at the University of Otago in New Zealand. A second study was carried out for the charity Reunite by Dr Marilyn Freeman;[385] it revealed that:

- For many fathers contact after relocation – whether within or outside the UK – remains fraught with difficulty. Direct contact, ordered by the court, is often only 'aspirational': the reality is that after the cost of litigation, relocation and setting up two homes neither party can afford it; some fathers are bankrupted. The courts seldom consider such practicalities when allowing removal.

- Contact is easily thwarted once the child is in a new country. A father who has flown halfway round the world only to be sent

[385] Dr Marilyn Freeman, *Relocation: the Reunite research*, the Reunite Research Unit, July 2009, http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Relocation%20Report.pdf

home again will find it difficult to persevere. Even such 'Disneyland contact' as he may achieve will be far from ideal and difficult to maintain if it only happens once or twice a year: direct contact can be very strange and unsettling for a child who hasn't seen their father for 6 months. Long journeys place considerable strain on children, and they can become hostile to international contact.

- Mirror orders are not applied by many countries or applied as might be hoped. The UK courts have no power to enforce them in non-EU countries which may take a different view of the case. Proposals for contact put forward by the applicant parent are often wildly optimistic.

- Relocation weakens a family financially. There is a high cost of the relocation itself, the cost of the legal dispute, and the additional cost of maintaining two homes. If the father has a second family, there may be very little money available for contact.

- Even when a father is able to maintain contact, often at great expense, there is little chance that relationships with the wider family of grandparents, cousins and half-siblings will survive the relocation.

- Indirect contact, ordered as part of a Contact Order, rarely happens and cannot be relied on. Most forms of communication depend on the resident parent if they are to take place, and if that parent is obstructive the communication simply will not happen. Sometimes no address or telephone number is left, and the relocating parent effectively disappears.

- CAFCASS promises parents it will be involved to ensure that contact continues; the reality is that once the child has been out of the jurisdiction for three months CAFCASS no longer has influence.

- It is important to remember that the purpose of relocation in a great many cases is to stop contact entirely. Undertakings made by resident parents to continue contact are notoriously unreliable (despite fooling the courts): they are made in order to get the leave of the Court for removal, not out of any commitment to protect the relationship with the other parent.

The result of a debate by Resolution (the association for family lawyers) in 2005 by 77 votes to 19 was that leave to remove is too easily granted. The study showed that the welfare checklist is largely inadequate in leave to remove cases and has urged that it be rewritten to rectify this.

Neither the Children Act nor the Human Rights Act have had any impact on the judgement of leave to remove cases over the last 40 years.

14.3.2. Poel & Payne

A parent who wishes to take their child out of the country permanently must apply to the Court for 'leave to remove' (LTR). The law itself (**Section 13**, Children Act 1989) gives very little help in this area:

(1) Where a Residence Order is in force with respect to a child, no person may—

(b) remove him from the United Kingdom;

without either the written consent of every person who has Parental Responsibility for the child or the leave of the court.

Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month [i.e. 28 days]*, by the person in whose favour the Residence Order is made.*

The courts tend to apply the same principle when there is no Residence Order in force, since the law does not specifically provide for that circumstance. Case law indicates that even where the other parent has no Parental Responsibility, they may still be deemed a *de facto* primary carer with 'rights of custody'; see Re B (A Minor) (Abduction) [1994] 2 FLR 249 and Re O (Abduction: Custody Rights) [1997] 2 FLR 702. If a parent wants to take a child to live abroad permanently, they must therefore have the consent of the other parent or the leave of the Court.

Courts deciding whether to permit a leave to remove application are guided by two leading precedents of which the first is Poel v Poel [1970] 1 WLR 1469 in which a mother applied to take her three-year-old child to New Zealand. The Court ruled that 'this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has rightly been given.' Note the use of the word 'rightly'; in other words, if you are the non-resident parent you have already been judged unfit to care for your child and half the battle has been lost.

The second and more influential precedent is provided by the judgement given in **Payne v Payne [2001] EWCA Civ 166** by the President, Elizabeth Butler-Sloss, and Lord Justice Thorpe. A mother had applied to move her child to New Zealand; the lower court rejected her application and she appealed. The father sought to use the recently introduced Human Rights Act, and in particular the Article 8 right to respect for family life, to counter the application. His case was catastrophically hampered by a CAFCASS officer who was ignorant of the law and based her limited understanding on notes made by a colleague at a seminar she herself did not attend.

Thorpe held that since the principle of the child's welfare always remained paramount, Article 8 could safely be ignored; he also pointed out that Article 2 of Protocol 4, though not yet ratified by the UK, protected the 'right to liberty of movement and freedom to choose his residence' and that the right to family life was thus not the only right to be weighed.

Elizabeth Butler-Sloss derived from Payne the criteria which would henceforth apply in leave to remove cases: 'the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases',

a) The welfare of the child is always paramount, so all aspects of the welfare checklist must be considered, and the child be given the opportunity to express his feelings;

b) There is no presumption created by s.13(1)(b) in favour of the applicant parent;

c) The proposals for relocation must be practical and include measures for ensuring continued adequate contact with the other parent;

d) Consequently, the proposals have to be scrutinised with care and the Court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end;

e) The Court must consider the effect upon the applicant parent and the new family of the child of a refusal of leave;

f) The Court must consider the effect upon the child of the denial of contact with the other parent and in some cases his wider family;

g) The Court must consider the arrangements for ensuring continuing contact between the child and the remaining parent.

These points apply only where the question of residence is not an issue: the Court should first consider which parent should be the resident parent, taking into account where the child will live, and any plans the parent has for relocation.

Note: that these criteria do not ensure that contact between the child and the 'left behind' parent continues. According to the father's counsel, Philip Cayford QC, commenting 10 years later, all contact between father and daughter ceased following the mother's move to New Zealand. As a precedent, that's all you really need to know about it; clearly the mother had not been committed to preserving contact. Thorpe had been dismissive of the father's legitimate concerns – 'International travel is comparatively cheaper and more competitive than ever before. Equally communication is cheaper and the options more varied'.

Thorpe employed two crucial principles to allow the mother's application. The first follows on from the ideology of the primary carer which we presented in the **Introduction**, i.e. that a child can have only one primary carer on the separation of his parents, and that once custody is awarded to that parent they have almost unlimited rein to do as they choose. Thorpe chose to call this principle 'natural emigration'; he held that the Court has no right to interfere with a mother's right to move abroad if she wishes to do so; it would be what he was later to term 'an unsustainable restriction on adult liberties'. To frustrate 'natural emigration' risked the survival of the new family or blighted its potential for 'fulfilment and happiness'. The fact that the ruling would mean a total loss of the relationship with the children's father was inconsequential,

> *These are the tides of chance and life and in the exercise of its paternalistic jurisdiction it is important that the Court should recognise the force of these movements and not frustrate them unless they are shown to be contrary to the welfare of the child.*
>
> *Often there will be a price to be paid in welfare terms by the diminution of the children's contact with their father and his extended family.*

It seems to us that these two sentences are contradictory: if there is 'a price to be paid in welfare terms' by loss of contact with the father then that is 'contrary to the welfare of the child'. Thorpe's judgement considers the 'fulfilment and happiness' of the mother and her new family exclusively; it entirely disregards the father's. The principle of 'natural emigration', which Thorpe invented for the purpose of this case, is to take precedence over the wrecking of the 'old family', and the interests of the child.

Thorpe's second principle can be termed 'detrimental impact'; he ruled speculatively that the mother should be allowed to remove the child from the jurisdiction since to refuse permission would have a 'devastating' effect on her 'psychological and emotional stability',

> *Refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the Court concludes that it is incompatible with the welfare of the children.*

This explains the apparent contradiction we noted: in Thorpe's mind the child is only caused harm – and thus the welfare principle is engaged – through the mother, the primary carer. The father is not the primary carer and thus any diminution in his ability to care is not deemed harmful. In a key speech on relocation[386] Thorpe clarified,

> *In the paradigm case the Court weighs the impact on the mother of refusal against the diminution in the father's contact. This balance is struck in the context of the welfare of the child. Thus the harmful impact on the mother is taken to be harmful to the child: the diminution in contact is a deprivation of the child's right to relationship with his father.*

You might say – not unreasonably – that any harmful impact on the father cannot be harmful to the child if the father is out of the picture, but Thorpe is not consistent and he reverses his principle when the parent wishing to remove is the father. In Re H (Agreed Joint Residence: Mediation) [2004] EWHC 2064 (Fam), [2005] 1 FLR 8 a father who had been granted residence (the mother was an alcoholic) proposed to move with his children to Northern Ireland; Thorpe prevented the move and the appeal was dismissed. The judge used the welfare test and took the view that the effect on the mother would be devastating, as would be the knock-on effect of her devastation on the children. Thus detrimental impact is linked to the primary carer only when that parent is the mother.

In **Re S (A Child) [2001] EWCA Civ 847**, [2001] 3 FCR 154 and **[2002] EWCA Civ 1795**, [2003] 1 FCR 138 Thorpe expressed both of these two principles. The courts recognised, he said,

> *the great importance of not imposing on primary carers' restrictions on their freedom to choose their preferred way of family life and their preferred place of residence for two good reasons. The first is that often the notion of such restrictions are simply contrary to good sense and, secondly, because the imposition of restrictions is likely to have an*

[386] Lord Justice Thorpe, *Relocation: the search for common principles*, speech delivered to the London Metropolitan University, 30 June 2010, http://www.judiciary.gov.uk/docs/speeches/lj-thorpe-speech-relocation-london-metropolitan-uni-300620102.pdf

> *adverse effect on the welfare of the children indirectly through the emotional and psychological disturbance caused to the primary carer by denial of the freedom to exercise reasonable choice.*

Thorpe's appeals to 'good sense' and to 'likelihood' are hardly compelling arguments. If fathers wish to remain involved, his preferred solution is that they should relocate too, though he regrets that the Court cannot order that,[387]

> *In such cases the Court has not the power to order the result that would best serve the interests of the child.*

14.3.3. Challenging Payne

It is actually alarmingly easy to counter Lord Justice Thorpe's arguments: his first is simply wrong. 'Natural emigration' is not obstructed if a court does not grant a mother leave to remove: she can either remain in the UK, or she is free to emigrate, but without the child; it is her choice, not the Court's. As long ago as 1996 Lord Justice Ward was able to make this vital distinction, in Re D (Minors) (Residence: Imposition of Conditions) [1996] 2 FLR 281,

> *The court was not in a position to overrule her decision to live her life as she chose. What was before the Court was the issue of whether she should have the children living with her.*

To order that the children remain behind with the other parent is not to infringe upon the rights of a parent to emigrate if she so chooses. That may seem brutal, and most mothers will choose to remain with their children, (it's not an argument we would advise you to use in court: 'judges are not generally impressed by that tactic', says Thorpe[388]) but it is an important distinction, and one Thorpe, whose stock-in-trade should be fine distinctions, has dishonestly attempted to gloss over.

To claim 'detrimental impact' requires hard evidence, and there simply isn't any. Thorpe's view is purely speculative. The only academic support was provided a couple of years after Payne by Professor Nigel Lowe in a controversial book called *International Movement of Children*.[389] In the later case of **Re B (A Child) [2007] EWCA Civ 1055** Thorpe summarised Lowe's approach,

> *He... considers movement of children within the UK, and reviewing the cases, concludes that a primary carer faced with an application for a Prohibited Steps Order or the imposition of conditions on a Residence Order, will not, save in an exceptional case, be restrained by the court, because for the Court so to do would be an unsustainable restriction on adult liberties and would be likely to have an adverse effect on the welfare of the child by denying the primary carer reasonable freedom of choice.*

By referencing the book Thorpe merely gives academic support to what had already been his position in Payne v Payne of 2001. To use

[387] Ibid.

[388] Op. Cit., Thorpe LJ

[389] Nigel Lowe, *International Movement of Children*, Jordan Publishing Ltd, 2003

Lowe's description of what courts usually do as justification for what courts should usually do is circular reasoning. It is important to note that Lowe was not a professor of child psychology or the like; he was a professor of law, and his assessment of effect on a child's welfare was outside his professional competence.

Lowe's contention may seem patronising, even insulting to women, portraying them as emotionally fragile while tougher males are deemed better able to cope with disappointment. There has been much research in the 40 years since Poel which shows Thorpe's speculation to have been in error. During the debate on leave to remove held by the family lawyers' association Resolution in September 2005 Dr Mark Berelowitz, a child and adolescent psychiatrist at the Royal Free Hospital, stated that there was no scientific basis for this thinking and that relocation could not be used as a treatment for parental distress or depression, which effectively is Thorpe's stance. Even Thorpe admits,[390]

> *Given that the principle* [of detrimental impact] *is not derived from expert evidence nor from many research studies in this jurisdiction the challenge* [that the principle is 'matricentric and discriminatory'] *cannot be lightly dismissed.*

So where does the idea come from? It is difficult not to imagine that Thorpe has argued the question in reverse: he begins with the desired outcome, the mother's relocation, which must be in accordance with the welfare principle. To refuse her application must breach the principle. How is that to be achieved? By proposing that refusal would be devastating to the mother and impact detrimentally on her capacity to care for her child, i.e. interfere with her role as primary carer.

The precedent in Payne applies principally to cases in which the mother is clearly identifiable as the primary carer; in many cases a residence order will identify her as such. In cases in which care is shared more equitably Mr Justice Hedley's ruling in **Re Y [2004] 2 FLR 330** applies. In this case the parents, an American mother and English father, lived in Wales and had an informal post-divorce arrangement of nearly equally shared parenting. The child grew up bilingual with Welsh as his preferred language.

The mother applied to remove the child to the USA; the father countered with an application for shared residence. The mother's application was refused and the father's accepted. The case did not fall within the ambit of Payne; the child's home was equally with both parents; the child's best interests were served by allowing him to remain in Wales.

> *I have adjourned this case into open court with, of course, the consent of both parties, for two reasons. First, because this case falls factually outside the ambit of well-settled authorities in this area of the law. It demonstrates, in a way few cases can, quite how, when everything has been said, done and considered the ultimate test remains the welfare of the child, which in the last analysis overbears all other considerations, however powerful and reasonable they may be. Secondly, because this type of case of trans-national marriage is and will continue to become increasingly common, and it seems to me that there should be public awareness of and*

[390] Op. Cit., Thorpe LJ

discussion about the intractable problems that it can raise and the sad consequences that can ensue.

The way in which precedent works in the Family Courts means that judges in all courts except the Supreme Court (and formerly the House of Lords) are obliged to follow precedents, and therefore Payne. Only the Supreme Court can overturn a decision based on Payne, but there are some indications of a change in attitude towards leave to remove applications. In the case of **Re D (Children) [2010] EWCA Civ 50** Lord Justice Wall, now President of the Family Division, acknowledged that it may be time to re-evaluate Payne,

there is a perfectly respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done of children by a permanent breach of the relationship which children have with the left behind parent.

In **Re W (Children) [2009] EWCA Civ 160**, Lord Justice Wall had challenged the doctrine of detrimental impact and dismissed arguments that the mother would suffer 'significant depression' if thwarted in her desire to move her two children to New Zealand.

- There was no medical evidence for the mother's 'significant depression' or that she would suffer more than disappointment if refused (the father also was depressed);
- There was no economic advantage in the move: the mother's new partner had made only 'half-hearted' attempts to find work in the UK;
- The mother's ties with New Zealand were 'slim';
- If the move were allowed the mother 'very significantly' would not actively encourage contact – 'there is a history of reluctance and of some control by the mother'. The mother's proposals for maintaining contact were 'unrealistic';
- The mother had failed to consider properly the loss of the wider family;
- The views of the children were of limited value, as they were based on misrepresentation by the mother;
- The mother's new partner was determined to go to New Zealand anyway, with or without her, and without their new baby, demonstrating 'a lack of commitment to family life'.

I have to say that I have no medical evidence of significant depression. I heard the mother come back when she was re-called and say that she was suffering and would suffer more if I turned her down. Mr Rowlands put it well when he said there will be very great unhappiness as a result of my decision one side or the other. The father also has had to have some medicaments for depression. It is not a case where I am able to say that the mother will be so savagely or severely damaged that this will get through to the children. She will be disappointed but she will have to consider what she can best do to overcome it if I turn down her application.

There were no grounds on which the Court of Appeal could overturn the lower court's decision; however Thorpe, somewhat irresponsibly perhaps, encouraged the mother to further litigation at a later date:

> *Nothing in life is final. An adverse decision in the year 2008 does not preclude another application in years to come if the circumstances support or impel renewed litigation.*

Other recent cases show that the outcome established by Payne is not inevitable. In November 2007 Lord Justice Thorpe upheld a decision by Mr Justice Coleridge that two boys their mother wished to take to France should remain with their father.[391] The boys had not settled in France and were very unhappy. The mother refused to listen to their objections and had shown 'an inability to recognise reality'. On holiday with their father in England they had refused to return; Coleridge rejected the mother's claim that the father had alienated the boys against her.

In M v H [2008] EWCA 324 (Fam) the crucial factor was the degree to which each parent was willing to promote contact. There had been historic problems over contact and the mother had previously sought to mislead the Court. The father was more likely to promote contact than the mother; the child remained with the father,

> *I agree with the Guardian and the submissions made on behalf of the mother that the most significant or magnetic factor in this case is which parent would be most likely to promote Sophie's continuing relationship with and her contact with the parent who is not living in the country where Sophie goes to school and who therefore will spend less time with her.*

As a barrister Nicholas Mostyn QC (who earned a reputation as 'Mr Payout', winning colossal awards for ex-wives) had acted on behalf of a father opposing an LTR application in a case before Lord Justice Thorpe, Re G (Leave to Remove) [2008] 1 FLR 1587. He had argued that Payne was out-dated and heavily criticised, and represented a time when Shared Residence Orders were not commonplace,

> *The current principles applicable in relocation cases need to be reviewed, as they place an impermissible gloss on the statute; wrongly prioritise one factor above all others (the impact of refusal on the primary carer); are out of step with modern views of the dynamics of family life and of the importance of co-parenting; are inconsistent with the approach taken in many overseas courts, both common-law and civil, and are the subject of serious public criticism, both popularly and by the legal community.*

Thorpe rejected these powerful arguments on the grounds that since his 2001 Payne judgement there had not been 'a self-evident social shift that requires its reconsideration' (paragraph 14). This is sly: the social shift had occurred prior to 2001 and was on-going; Thorpe was already considerably behind the times.

Mostyn is one of a new generation of judges willing to question the orthodoxy of the past and with sufficient chutzpah to challenge old-school judges. In the case of **Re AR (A Child: Relocation) [2010] EWHC 1346** Mostyn refused a mother leave to remove her child to

[391] Frances Gibb, *Judges back two British boys who refuse to live in France*, The Times, 08 November 2007, http://business.timesonline.co.uk/tol/business/law/article2827739.ece

France (the mother was French) and made an order for shared residence instead; he said,

> *In my view (for what it is worth) a review of the ideology of Poel/Payne by the Supreme Court is urgently needed, where the "emerging body of significant research in various jurisdictions" would be brought into account.*

Mostyn's use of the word 'ideology' is significant. He was critical of Thorpe's judgement in Payne v Payne which was itself a reiteration of principles laid down in Poel v Poel [1970] 1 WLR 1469 which was founded in the principle that a child should have only one custodial parent or primary carer. Lord Justice Sachs had said,

> *When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as Winn LJ has pointed out, produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results.*

Mostyn made it clear that this is an ideological position (the words 'rightly' and 'properly' are subjective) and is tendentious in the sense that it has created a tendency in which LTR applications are normally granted and the respondent, non-custodial parent is written out of the child's life (as the father was in Payne).

Mostyn then made what we consider to be an essential point:

> *Moreover, some argue that* [this ideology] *promotes selfishness and detracts from the importance of co-parenting. Some argue that on the birth of children parents are indentured to sacrifice throughout their minority, but that the one word that is missing from Payne is, in fact, sacrifice.*

In **C v D [2011] EWHC 335 (Fam)** a mother applied to remove the children to America; the father opposed. Care was shared with the father doing a third and working well in the children's best interests. The mother's application was refused, but the Court also refused the father's application to increase his share to half.

In **Re K (Children) [2011] EWCA Civ 793** (also reported as K v K) a Canadian mother applied to take her two young daughters to Canada. The Polish father objected on the grounds that care was shared more-or-less equally. CAFCASS recommended the mother's application be refused. In the lower court Her Honour Judge Bevington granted the application.

The father appealed. Bevington had rejected the CAFCASS report without sufficient explanation; she had relied on the Butler-Sloss criteria in Payne and not on Hedley in Re Y and had referred only to the mother's case. The Court of Appeal allowed the father's appeal: Payne applied only where the mother was primary carer; both Payne and Re Y should guide the Court and all the facts of a case should be considered. Thorpe said,

> *Where each is providing a more or less equal proportion and one seeks to relocate externally then I am clear that the approach which I suggested in paragraph 40 in Payne v Payne should not be utilised. The judge should rather exercise his discretion and grant or refuse by applying the statutory checklist in section 1(3) of the Children Act 1989.*

Following these cases lawyers warned that by making leave to remove more difficult parents would bypass the legal process and the number of abductions would rise.

Notwithstanding these cases, English and Welsh courts' habitual position is increasingly out of step with the rest of the world; new legislation in Australia,[392] for example, emphasises as a primary consideration 'the benefit to the child of having a meaningful relationship with both of the child's parents'. Refusal to re-examine Payne is no longer defensible since the UK became a signatory to the Washington Declaration on International Family Relocation[393] which rejects (at paragraph 3) the use of a presumption such as Payne demands. It obliges courts to consider (at paragraph 4 (i)) 'the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest' and (viii) 'the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties'. Mostyn commented,[394]

> *The hitherto decisive factor for us – the psychological impact on the thwarted primary carer – is relegated to a seemingly minor position at the back end of para 4(viii).*

This challenge to what has been habitual for so long caused Lord Justice Wilson some concern; in Re H (19th May 2010) he asked,

> *I wonder whether consideration may need to be given as to whether, if the present law of England and Wales does indeed perhaps place excessive weight upon that factor, paragraph 4 of the declaration, as presently drawn, by contrast places insufficient weight upon it.*

Under the Declaration the Court must take into account the impact on the child and his 'left-behind' parent of granting leave and must balance this against any detrimental impact on the applicant of a refusal. Failure to balance these conflicting elements, Mostyn said,

> *appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions… The parent who stoically accepts that she would accept the decision, make the*

[392] Family Law Amendment (Shared Parental Responsibility) Act 2006
[393] http://www.hcch.net/upload/decl_washington2010e.pdf
[394] Re AR

> *most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically. This is the reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward.*

It cannot be doubted that the principles of Poel and Payne oblige courts to give insufficient weight to the right of a child to maintain contact with half of his family and to the impact on the left-behind parent. In refusing the mother's application to remove Mostyn observed,

> *If one were to draw up a hierarchy of human rights protected by the Convention* [on Human Rights] *I would have thought that very near to the top would be the right of a child, while he or she is growing up, to have a meaningful participation by both of his parents in his upbringing. Although this is (strangely) not explicitly spelt out in the text it must be implicit in the notion of the right to a family life. Recognition of the existence of this very obvious and critically important right is sometimes, so it seems to me, lost in the relocation cases.*

Thorpe himself acknowledged (in [2010] IFL 127) that 'the case for such a shift (from the principles laid down in Poel) is not difficult to articulate' and that for England and Wales to adopt the Declaration 'would represent a significant departure from the principles that our court has applied consistently' since Poel.

It is relevant finally to repeat Thorpe's own warning that the assumptions upon which family law decisions are based (such as his opinion in Re S as to what constitutes 'good sense') should regularly be re-evaluated,

> *Very few family law decisions that are 'principled' decisions have a shelf-life of more than one generation. Most principles in family law are actually founded upon social policies or social assumptions made by the judges. Those assumptions as to child development or child help have to be reviewed from time to time.*

14.3.4. Prevention

Leave to remove applications are almost invariably made by mothers and are nearly always granted; this is despite the growing acceptance of shared residence by the courts. If you are to prevent leave to remove in your case you will need to look first at the principles which govern leave to remove cases, then at the arguments which have been successful in securing leave to remove, and finally at the arguments you must use to prevent it.

Removal from the jurisdiction is nothing less than court-sanctioned abduction. The parent applies to the Court for 'leave to remove' rather than simply taking the child anyway. If the resident parent is making an application to the Court they are showing a certain respect for the rule of law which suggests they are prepared to accept the Court's decision and to follow appropriate procedure; this potentially gives you an opportunity to prevent removal and your single chance to

hold on to your child. Don't bank on it, though, they may just be luring you into a false sense of security.

Some applications for removal follow on from an unsuccessful abduction or cases where a child has been abducted and then returned under the Hague Convention. In such cases the Court will *not* take into account the abduction, or consider that the abducting parent has behaved unacceptably.

Note also that in contrast to contact applications, there is no requirement to seek mediation before legal aid is granted.

Many resident parents will move considerable distances in order to thwart contact; moving across the Scottish border is particularly popular because Scotland operates under a different legal jurisdiction and English parents are then forced to attend court in Scotland; this is discussed further in the next chapter. Moving to Scotland does *not*, however, constitute removal from the jurisdiction (due to an anomaly we'll cover), so the leave of the Court is not required.

If the resident parent intends to move away with the children, whether within the jurisdiction or outside it, and you oppose this move, you stand little chance of preventing it – particularly if, as is probable, you are the father. Courts will generally interpret any attempt to stop a mother moving to wherever she chooses – or emigrating – as an attempt to control her or to interfere with her human rights. The Court is very unlikely to see the situation as the mother attempting to prevent contact, however much that may be the reality.

You are best placed to fight a leave to remove application if there is established shared parenting or, better still, if there is a shared residence order in place. In that case Hedley's Re Y ruling applies. If there is only limited contact taking place or if you have a contact order Re Y will not apply and you are at the mercy of Payne. Your obvious first step is therefore to apply for a shared residence order.

Judges are given the following guidance on 'leave to remove' applications by the *Family Bench Book*.[395]

- If the country to which the resident parent intends to take the child is *not* a Hague Convention country the case must be referred to the High Court.

- If the country *is* a Hague Convention country the application is made for a Specific Issue Order under Section 8 of the Children Act or under Section 13 whereby a judge may give the consent usually required from the other adult(s) with Parental Responsibility for a removal from the jurisdiction. Section 1(1) CA, the paramountcy of the child's welfare, always applies.

It can be seen, therefore, that a LRT case involves overriding the parental responsibility of the respondent parent and the applicant has to show why this should be. The overruling principle is that if the proposed move is 'reasonable', for the respondent to withhold consent is 'unreasonable' and leave to remove should only be refused if it can clearly be shown that the child's interests are incompatible with those

[395] *The Family Court Bench Book*, Judicial studies Board, February 2006

of the resident, applicant, parent. Incompatibility of interests will depend on two questions:

1. The effect of removal on the child's relationships with those left behind, and

2. Conditions in the host country.

Deciding the first question will exercise the judge's discretion, but the guidance is that refusal based on this should be 'unusual'. It can be seen from this that the presumption to allow a leave to remove application is a strong one.

The Court will grant leave to remove if the 8 criteria defined by Butler-Sloss in Payne can be satisfied. Your task therefore is to show that they are not satisfied. If you have allowed yourself to become the contact parent you are at a considerable disadvantage. In the Butler-Sloss criteria the effect of a refusal on the applicant parent is considered as very important, while the effect of leave to remove on the respondent parent is not a consideration; there is the clear implication that the child's welfare is linked to the mental state of the applicant parent but not to that of the respondent parent.

Remember also that despite the Court apparently following these guidelines, the child in Payne v Payne never saw her father again once leave to remove was allowed. The guidelines do not work.

a) The welfare of the child is always paramount, so all aspects of the welfare checklist must be considered, and the child be given the opportunity to express his feelings.

Your guide throughout must be the paramountcy principle and the elements of the welfare checklist.

Removal from the jurisdiction is not in your child's best interests as they are settled (see **definition** above) at school and moving them away would disrupt their relationships with teachers, friends, other relatives, and, of course, yourself.

The other parent is acting unilaterally, disrupting the child's well-established routine, and shared parenting with you has been terminated without regard to the child's best interests.

Has your child been given the opportunity to express his views or is he being bullied into accepting the move? Is he fully able to understand the implications? Bear in mind that if he has been told of the plan to move abroad and is excited about it, any move by you to block the plan may impair your relationship with him. It will certainly upset the applicant, and they may take it out on your child.

b) There is no presumption created by s.13(1)(b) in favour of the applicant parent.

Simply because the applicant has residence does not give them an automatic right to remove the child from the jurisdiction; they still have to prove their case.

c) The proposals for relocation must be practical and include measures for ensuring continued adequate contact with the other parent.

You must scrutinise the application and look for weaknesses in the plan. The plan must include:

1. Proposals for the child's living arrangements.

2. Arrangements for the child to remain in contact with the other parent. How will you travel? Who will pay for this? Where will you stay? Has the applicant considered any of this?

3. Arrangements for supplying the child's financial needs.

4. Finalised arrangements for the child's education – is there a firm offer of a school place? You should be given full details of the school including prospectus and syllabus. Is this the right place for your child? Is your child at a point in her education where a move will be disruptive? Have you been consulted on alternatives? Were you involved in the decision?

5. Is your child involved in other activities – sporting or artistic, for example – which will be disrupted? Will she be able to continue these? What about sports teams, drama societies, orchestras, etc?

6. Can your child speak the language of the new country? What measures will be taken to ensure she learns?

7. Registration of the child with a doctor, dentist, optician, etc. Does your child have any special health needs?

8. An account of the reason for wishing to move abroad – family, marriage, job, etc.

9. Evidence of the financial viability of the plan, including job offers.

10. Evidence of the accommodation, including address, pictures and estate agent's particulars.

11. Evidence of links to the new country – family, etc.

12. Evidence of social opportunities and network.

13. Evidence that Court Orders made in the UK will be recognised and enforced in the new country.

14. Expert evidence of the psychological and developmental effects of removal on the child.

If *any* of this evidence is missing or inadequate, challenge it.

Don't rely simply on attacking the plan for removal, though. You, too, must put forward a comprehensive and clearly thought-through plan regarding how you will care for your children if leave to remove is refused. What will you do if the other parent leaves anyway and dumps the children on you?

Use research to counter the application – for example concentrate on legal issues: is the country a Hague Convention signatory? Does it respect the Convention?

d) Consequently, the proposals have to be scrutinised with care and the Court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.

If there has been a history of obstructed contact you can use it to present this application as another development in that. Get the Court to look at the history of contact and use this to undermine the application. Beware, however, that the Court may allow the application in order to rescue the child from a conflicted situation.

Establish that the other parent has no pressing need to relocate (this may be difficult) and that there was no discussion with you to seek viable alternatives. You therefore suspect the other parent's motives and believe the purpose of the application is to prevent contact.

e) The Court must consider the effect upon the applicant parent and the new family of the child of a refusal of leave.

A father who opposes the removal of his children must challenge the presumption that the effects of a refusal will be devastating to the mother and impair her ability to be an adequate parent.

You must demonstrate the lack of medical evidence that a refusal will damage the mother's mental health and thus interfere with her ability to parent. Use **Re W (Children) [2009] EWCA Civ 160** to show that she will merely be disappointed.

f) The Court must consider the effect upon the child of the denial of contact with the other parent and in some cases his wider family;

Demonstrate to the Court, using the studies referred to above and the precedent of Payne itself that allowing the other parent's relocation will effectively erase you from your child's life.

Get all of your extended family to submit written statements explaining the effect on them of allowing the removal. Can they travel easily, or will they be prevented by ill health, age, other family responsibilities or lack of funds?

g) The Court must consider the arrangements for ensuring continuing contact between the child and the remaining parent.

These arrangements must be practical and affordable. Thorpe's casual comment in Payne that 'international travel is comparatively cheaper and more competitive than ever before' is all very well for those on a judge's salary, but not if you are on or below the average wage.

If the application is refused, will you nevertheless stay in contact with your child? Many non-resident parents lose contact entirely even when their child remains geographically close, and the prevailing view is that it is their own fault; how will you convince the Court that you won't respond to a refusal to grant the application by being one of those parents who loses all contact (look at it from the Court's point of view)?

The standard response to an application to remove is to contest the Specific Issues Order applied for, and to make your own application for a Prohibited Steps Order (PSO). PSOs are difficult to obtain, however, and there are certain problems associated with them; please read the section on PSOs in **Section 5.3.2** which explains their limitations. A PSO is only ever temporary and cannot be made if another order is better suited to the circumstances.

You can also counter the application with one of your own for residence, but think carefully: will it look vindictive? Is there a reasonable chance of success? Is residence realistic and practical for you? You will need to present a very detailed and convincing parenting plan for it to work.

The Court will normally be reluctant to agree to the PSO 'because for the Court so to do would be an unsustainable restriction on adult liberties and would be likely to have an adverse effect on the welfare of the child by denying the primary carer reasonable freedom of choice'.[396] At one time the courts would refuse a Shared Residence Order (SRO) if there was a considerable distance between the parents, but the case to cite is Re F (Shared Residence Order) [2003] 2 FLR 397 discussed in **Chapter 1** above. An SRO is not, however, regarded as a bar to removal, though it will help.

As we have seen, the Court may, if it desires, impose conditions on any of the orders provided under Section 8 by applying Section 11(7). These include making an order which restricts the respondent's residence to within the UK.

[396] Nigel Lowe, Mark Everall & Michael Nicholls, *International Movement of Children (Practice & Procedure)*, Jordan Publishing, August 2003

See if you can find someone to McKenzie for you; never go to Court alone. Because the law is based on preserving the *status quo* it should favour you but as we know the law does not actually work like that. You will have your work cut out to achieve this because so often in these cases the view taken is that an unhappy mother leads to an unhappy child, and that the child's best interests are therefore served by keeping the mother happy.

It is unlikely that you will be able to prevent the removal of your child abroad, but essential that you fight such a move. This will almost certainly improve your bargaining position, and you stand a better chance of winning defined contact, shared residence, and shared costs of contact (travel expenses, etc). You will also make things a little easier for the next father, and make it a little more likely that eventually these moves out of the jurisdiction will not merely be rubber-stamped.

14.3.5. The role of CAFCASS

The belief that frustrating 'natural emigration' will be 'devastating' to mothers, and hence to their children because of the impairment caused to the mother's parenting skills, is taken as a given in leave to remove cases, and courts will be very reluctant to obtain specific psychiatric or psychological expert evidence. CAFCASS s.7 reports pay too much – or exclusive – attention to the impact on the mother of refusing an application and insufficient attention to the impact of relocation on the child.

CAFCASS often consider it a foregone conclusion that the courts will allow an application. Judges assume that once a mother has expressed her intention to emigrate, she will be quite unable to cope with staying within the jurisdiction, and therefore quite unable properly to care for her child; CAFCASS believe it is in the best interests of the child, therefore, to accede to her application. This is to place the mother's needs above those of her child.[397]

Not only do courts and CAFCASS fall for the 'distress' argument, they also seem extraordinarily blind to basic human psychology;

- they accept at face value the applicant's promises to allow unobstructed contact in the new country (in spite of endless experience to the contrary);
- they overlook the fact that the leave to remove application has followed on very swiftly from the non-resident parent's attempt to establish his parental rights;
- they fail to see the applicant swing suddenly from implacable hostility one week to remarkable self-control the next;
- they do not consider that removal from the jurisdiction provides the perfect opportunity for coaching and parental alienation;
- they ignore the illogicality of the argument that a child's loss of a way of life he has yet to experience should be greater than the loss of one of his parents;
- they assume all applications will be granted and thus seldom judge cases with regard to the particular needs of the individual child.

CAFCASS should have an important role to play in the 1,200 or so leave to remove cases each year. A lawyer worth his salt will coach his client to play the 'distress' card, yet the courts do not, as a matter of course, seek expert evidence to confirm the claimed distress. Sadly, as the Reunite study showed, few CAFCASS officers have the skills to assess the impact on a child of removal from the jurisdiction, or to gauge the authenticity of an argument for 'distress'. Few are aware of the law in this area, or of procedure.

Furthermore, because the courts and CAFCASS notoriously do not keep any records of outcomes, there has been no research (until the 2009 Reunite study, above) to indicate the effect that removal (or its obstruction, for that matter) has on children (or on left-behind parents). Any recommendation by CAFCASS either for or against removal is therefore beyond the competence of their staff and should be challenged in Court; you should also use the fact that CAFCASS reports are more often than not unreliable and inadequate. Reunite conclude in their report,

> *The greatest imperative is for research to be urgently undertaken specifically into the outcomes of relocation and the effects of relocation on children. Without this scientific evidence, we are working almost entirely in the dark in an area of potentially dramatic impact on a child's life. We do not know whether, in general, relocation works well for children who adapt quickly and suffer no significant emotional loss, or whether, alternatively, relocation impacts negatively and*

[397] See the case of D v S [2002] NZFLR 116 in the New Zealand Supreme Court

substantially on a child's life and development and, if so, in which ways.

You are advised to seek independent representation of your child and to request the evidence of an expert witness. Claims for distress should be tested, and if unsupported by evidence, beyond a well-rehearsed piece of acting, should carry no more weight than any other unsupported and speculative claim.

14.3.6. Unmarried fathers

If you are an unmarried father without Parental Responsibility your position is weakened. For example In Re C (Child Abduction) (Unmarried Father: Rights of Custody) [2002] EWHC 2219, [2003] 1 FLR 252, FD, Mr Justice Munby considered a case in which the mother of the child had taken him to Ireland. The father sought his return under the Hague Convention.

Because the parents were not married the Court had to consider whether the father had rights of custody within the meaning of the convention despite not having Parental Responsibility under English law. Munby J held that the case was indistinguishable from the decision of the House of Lords in Re J, also reported as C v S [1990] 2 All ER 961. Consequently, the father was *not* to be regarded as having custody rights under the Convention.

At best, the father could argue that he was caring for the child jointly with the mother, a situation considered in C v S. Obviously these responsibilities had ceased by the time the mother took the child to Ireland. The father then raised an alternative argument, that the Court was seized (see **Glossary**) with the issue of custody because his application for a Residence Order had been made by the time the mother left the country, although it had not been served.

Munby noted that the issuing of proceedings in wardship was sufficient to give rise to custody in the Court, e.g. Re J [1990] 1 FLR 276 and Re B-M [1993] 1 FLR 979. Similarly, the Court was seized of the case for Convention purposes when a judge had exercised a judicial discretion over the conduct of proceedings (even if in fact there was no substantive order, only directions); see Re J [1999] 2 FLR 653. However, a mere administrative step without judicial involvement was insufficient (Re H [2000] 2 All ER 1). In Re C the father's claim failed. The Court was not sufficiently seized of the case as to have rights of custody vested in it.

The lesson to be drawn from this, as Munby pointed out, is that unmarried fathers who fear the immediate removal of their children should issue proceedings and apply immediately to the judge for relief in order to ensure that there will be a remedy under the Hague Convention should the child be taken from the jurisdiction. Otherwise, there is a gap in the protection offered between the issuing of proceedings and service.

14.3.7. If removal is allowed

When the English or Welsh court allows a leave to remove application it surrenders its authority to the foreign court. All existing orders become void.

Once a child is established in a new home abroad there is little hope of getting him returned to the UK. In Sylvester v Austria (App Nos. 36812/97 & 40104/98) [2003] 2 FCR 128, [2003] 2 FLR 210, ECHR) a father took his case to the European Court of Human Rights following the failure by the Austrian courts to enforce an order under the Hague Convention for the return of an abducted child. After fruitless attempts to enforce the order that the child be returned to the father in the USA, the Austrian Supreme Court took the view that the child's changed circumstances now meant it was inappropriate to force return. It noted in particular the impact of the lack of contact with the father. The ECHR found that the delays were the responsibility of the Austrian Government: it had been at fault in failing to secure expert reports promptly and failing to take steps to locate the mother when she changed her whereabouts in order to defy the return order. This constituted a breach of Article 8 of the European Convention on Human Rights in respect of the rights of both the father and the child.

Despite this apparent vindication, however, the child was not returned to the father, and damages were awarded instead, as if monetary value could be placed on the loss of a child. The case shows why it is so important in such cases to act swiftly and to avoid delay.

Under Article 9 of the Brussels II Revised Regulation (BIIR)[398] jurisdiction remains with the original state for three months (though only to modify and not to enforce the order) and then transfers to the new state. Since it will have been the original jurisdiction which made the order allowing removal, it is difficult to see how this will help you. It is easy for a party to honour a Contact Order for three months, and then to ignore it thereafter.

Leave to remove is permanent. If you are the 'incorrectly gendered' parent this is one area where the system is heavily weighted against you and in favour of protecting the happiness of the 'correctly gendered' parent. Once the resident parent and the child are out of the jurisdiction contact can no longer be enforced without further litigation in the new jurisdiction and is dependent entirely on that parent's good will (which by definition is imperfect or absent) and on the non-resident parent's ability to fund trips to the new country. Ironically you may find that the family justice system in the new country is better able to order and enforce contact; if it isn't you will lose your children.

If you think you cannot reasonably prevent the move (and generally if you are a father you will find it very difficult to do so) you will be better advised to allow the move and ensure you have shared residence or a Contact Order giving you substantial time with your child in the holidays.

The expense of contact (flights, hotels, etc) should be deducted from your child support, and you should try to get an order that involves your children's other parent in sharing these costs. Many countries have a reciprocal arrangement with the CSA/CMEC so you won't be able to evade paying entirely.

Note that when the Court's decision goes against the applicant – contrary to their expectations – they are quite likely to abduct the child anyway.

[398] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF

Be prepared to appeal any judgement with which you don't agree. You've nothing to lose, at worst you might buy some more months.

Where leave to remove is granted, the courts are advised by the *Family Bench Book* to give consideration to imposing conditions, including:

- An Undertaking to return the child if ordered to do so;
- A financial bond to guarantee compliance;
- Obtaining what is termed a '**mirror order**' in the host jurisdiction.

Where an order is made permitting relocation a Contact Order should also be made. This must then be certified under the BIIR arrangements. The judge should issue the certificate (Article 41), so make sure he does! This will enable you to fast-track the application if you need to apply for enforcement of the Contact Order in the new state. Note that the new state can make a new order on application from the relocating parent which will make the existing order obsolete. In practice these international agreements are unnecessary where the relocating parent is of good faith, and pretty much useless where they are not.

You must also ensure that your Contact Order is registered in the new state, and that a mirror order is made. This must include things like telephone calls, email, and contact by webcam. Lawyers in the UK seem very poorly informed on these matters (which is why these cases are often transferred to the High Court), though not all countries will make mirror orders, or apply them if they do.

It is possible under BIIR for the UK court to order as a condition of the leave to remove that any further disputes over contact are resolved in the UK. This will obviously save a great deal of time and money if you don't have to travel abroad to a foreign court and pay for legal representation.

Under Article 12 of Council Regulation – Brussels II Revised jurisdiction acquired in one country (i.e. the UK) cannot be terminated by the decision of a court in another country; see Re S-R (Jurisdiction: Contact) [2008] 2FLR 1741. This jurisdiction extends to all matters of Parental Responsibility and confers on the Court power in family proceedings to make an order under s.8 of the Children Act 1989 even where no such application has been made; see **AP v TD [2010] EWHC 2040**.

The UK court can also order the mother to secure a mirror order in the foreign court as a condition of the leave to remove, but will be reluctant to do so, especially if she can convince the Court of her good intentions; by granting leave the UK court surrenders its jurisdiction.[399] To enforce contact, you will need to apply to the foreign court; first, you must apply to the UK court for leave to present any Contact Order and the leave to remove order to the foreign court.

In June 2010 the Hague Convention 1996[400] came into force which allows the 'advance recognition' in the new state of Contact Orders

[399] See, for example, Lord Justice Wilson in R (A Child) [2010] EWCA Civ 1137
[400] The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, http://www.hcch.net/index_en.php?act=conventions.pdf&cid=70

made in the original state. Under Article 24 you will also be able to request advance recognition. Where that is not possible you should obtain a mirror order.

Allowing removal, and making an effort to remain on good terms with your ex, could work in your favour – you could be set up with a free summer holiday for the foreseeable future! You may even decide to emigrate yourself. It is rare, however, for leave to remove cases to end happily.

14.4. Abduction

In 2008 336 abduction cases came before the Family Courts involving 470 children.[401] Child abduction is often the result of the separation of a couple of different nationalities or of different faiths. It is quite common, for example, for Islamic fathers to take their children back to their country of origin. The most common country for children to be taken to is Pakistan (30 cases in 2008), followed by the USA (23 cases), Ireland (22) and Spain (21). Other popular destinations include Australia, France and Egypt.

Around 40% of cases involve abduction to non-Hague Convention countries, which makes recovery very much more difficult. Mothers, in particular, will find it almost impossible to recover children taken to Islamic countries in which sharia law prioritises the rights of fathers over those of mothers.

Sarah Taylor, the British mother of 4-year-old Nadia Fawzi gave up her job, sold her house and moved to Libya following abduction by the child's father. After a long battle in the sharia system she won custody but the father still refused to comply with the Court order. Taylor's MP, Andy Burnham, flew to Tripoli for talks with the Libyan justice ministry, and Prime Minister Gordon Brown raised the case in meetings in Italy with the Libyan leader, Colonel Gaddafi.[402] We're afraid that if you are a father you won't receive this level of political intervention.

Because Scotland operates under a different jurisdiction from England and Wales, removal of a child to Scotland should constitute 'removal from the jurisdiction', but because the European authors of the Hague Convention on child abduction didn't actually realise that Scotland was a separate jurisdiction (you couldn't make it up) removal of a child from Scotland is not abduction. We'll look at this scenario in more detail in the next chapter.

In England and Wales there does not need to be a residence or custody order in place to qualify as abduction, but there does in Scotland if the child is resident in or was abducted from Scotland.

[401] Helen Pidd, *500 children a year abducted from the UK*, The Guardian, 09 August 2009, http://www.guardian.co.uk/world/2009/aug/09/children-abduction-kidnapping-uk-data

[402] Ibid.

Where there is no order in place an adult with Parental Responsibility (PR) may take a child to another country for up to 28 days without the consent of the other adults with PR.

If a mother abducts her child the courts often look very leniently on the case. There will be a tendency to assume that the mother abducted the child 'for a good reason'. If a father abducts his child he will be dealt with very much more severely and may well be given a prison sentence. Child abduction is not considered to be a 'sexual offence': R v Dootson [1994] Crim LR 702, but it may be viewed as a 'violent offence': R v Newsome [1997] 2 CR App R [S]69.

14.4.1. Prevention

While you may not be successful, it is vital that you do everything you can to prevent the abduction of your children if you believe them to be at risk. Get a **Child Abduction Prevention Guide** from the charity Reunite. This can be downloaded from the **Reunite website**.

Their Guide will encourage you to put together specific information about your child, including description, photographs, fingerprints, birth certificate and any Court Order applying to the child.

You should also compile a description, with photographs if possible, of any potential abductor.

You will need three sets of this information, and must then give one set to the police and one to your solicitor, if you have one, keeping the third yourself.

If you fear that removal may be the first step in an attempt to prevent contact entirely, perhaps by subsequently moving out of the jurisdiction, we would urge you to apply immediately, certainly within 24 hours, for an *ex parte* application for a summons. It is highly possible that your children's other parent will remove your child sooner than you think, and the object is to prevent this. So whatever you do, do it quickly.

This advice also applies if your children have already been taken.

Contact the Court Tipstaff who will then draw up the order. You will also need a 'Seek and Locate' Order and a 'Passport Delivery' Order; they will be drawn up by the Tipstaff office and executed by them before service on the defendant abductor of your summons or with informal notice or without notice orders. *Ex parte* means that you appear in Court before a judge without the other party being present; informal notice means that you do not complete all the usual documentation. You need to act very quickly and there is not time to do this. Don't waste time filling out forms; go to the Court and wait to see the duty judge; phone the Tipstaff in advance.

Some High Court Judges will include in a 'Tipstaff order' a direction that the defendant is to attend Court on a particular day at the High Court, to correspond with the day specified in the 'without notice order' which the process server will serve. On no account must you tip off the abductor!

The order without notice will include a prohibition upon disclosing the fact of the proceedings to the defendant again to avoid tipping off. The Tipstaff will take as many details as possible from you and

cooperate with the police to try and track the child down. The Tipstaff order can only be as useful as the information which you make available.

The judge will not grant the order unless you have everything prepared. You must give an Undertaking that you will commence proper proceedings on the next working day. You need to have your Position Statement, clearly setting out the facts, and the summons prepared so as to inform the judge as to exactly why your case is so urgent that it cannot wait.

The order will look something like this:

> *UPON THE UNDERTAKING of the Plaintiff to issue the Summons annexed hereto within 24 hours*
>
> *AND UPON RECEIVING the affidavit of the Plaintiff's solicitor dated ….*
>
> *And at the time of making this order UPON GIVING directions to the Tipstaff of the High Court of Justice to locate the said child and obtain the passport and travel documents of the Defendant and the said child until further direction of the Court to keep safely the documents referred to in paragraph (6) of this order*
>
> *UPON HEARING Counsel for the Plaintiff the Mother being neither present nor represented;*

- *This matter be restored before a Judge of the Family Division sitting at the Royal courts of Justice, Strand, London WC2A 2LL on ….at 10.30 am*
- *The Defendant shall attend the hearing provided for in paragraph (1) of this order in person as well as, if so advised, by counsel and solicitors;*
- *The Defendant shall file an affidavit in reply to the affidavit of the Plaintiff setting forth the defence to this application on or before ……(7 days)*
- *The Plaintiff shall have leave to file an affidavit in reply on or before (14 days?)……*
- *The Defendant is in the interim prohibited until further Order from removing the child from England and Wales or removing her overnight from the place where she currently resides.*
- *The Defendant is in the interim prohibited from applying for passports and travel documents for the child or herself until further Order.*
- *Costs in the Application.*

If you don't have Parental Responsibility you can apply for it at the same time when you go to the Court.

Once you have the without notice order and the summons you must arrange for a process server to serve them on the defendant as soon as possible.

A Seek and Locate Order is defined under **Section 33** of the Family Law Act 1986 and you apply for it on **Form C4**, *Application for an order for disclosure of a child's whereabouts*, or download it from the Ministry of Justice website. It's very easy to fill in. Return it to the Court with the **appropriate fee**. You will need to give your details and relationship to the child, and details of the name, sex and date of birth of your child, any identifying features, and a recent dated photograph if you have one; and the name and last known address of 'the person believed to have actual control of child.'

Provide the names of any people or agencies (such as the Social Services) to whom the order should apply, and specify how the information should be disclosed to the Court. Finally you must state why the Court does not have this information, and why you believe the person or agencies to whom the order is directed should have this information. Sign and date the form, keep a copy for your records and take it to the Court office with the appropriate fee. If necessary this application will be followed by a **Recovery Order** for the return of the child made under **Section 34** of the Family Law Act.

If you have a Residence Order (shared or sole) then under s.13(1) of the Children Act 1989 your children's other parent may not remove your child from the UK, and this can be enforced under s.63(3) of the Magistrates court Act 1980.

If the Court refuses to issue a search order for Tipstaff and the police, you should appeal the court's decision. Do not waste time, as every minute is vital. If there is any possibility that your children's other parent may have abducted the child abroad, you should also contact the International Child Abductions and Contact Unit on 020 7911 7127. If the parent might have abducted the child to another UK Jurisdiction (i.e. Scotland, Northern Ireland, or the Isle of Man) ask that the search include these jurisdictions.

You must act swiftly. If the Court reaches the conclusion that a new *status quo* has been established, and that the child has become 'settled' in a new place, the chances that the child will be ordered to be returned are greatly diminished.

There are other things the High Court can do in the event of a child's abduction:

- Order a 'Bench Warrant' for the immediate arrest of the abductor;
- Require mobile and other phone companies to disclose the incoming and outgoing numbers with whom there has been contact between particular dates;
- Order solicitors to disclose the whereabouts of a child who is subject to a Seek and Find Order or a child who is a ward of court or otherwise if so directed by the Court regardless of the rules of confidentiality which normally apply (see Re H [2000]1 FLR 766);
- Order publicity;

- Invoke Family Law Act Section 33 to require disclosure where a Part 1 order, usually a Children Act 1989 order under Section 8, is sought;

- Dispense with service on any party in order to avoid tipping off the abductor;

- Order sequestration of assets if there has been a breach of an existing Court Order to produce a fighting fund;

- Order banks to disclose statements which may show from where someone has drawn or spent money or show where the abductor worked between particular dates;

- Make an order in respect of a government department; see Practice Direction 20.7.95. For example, the Department of Work and Pensions may be ordered to disclose whether an application for social security benefits has been made;

- Order the Local Authority Housing department to disclose the address;

- Order the Health Authority to disclose the name of the GP of the abductor;

- Order the County Education Department to disclose whether the child's name appears on a school register. Remember mothers might change a child's surname for school but rarely the first name;

- Order a non-party to disclose to the plaintiff's solicitor their knowledge of the whereabouts of the child. If the party served denies knowledge a subsequent order may be made requiring the non-party to attend at the High Court to be cross examined under threat of contempt for breach;

- Require information from airlines, but you need to be specific or they cannot help;

- An order to restrain tipping off is often appended to an order intended to locate the child.

Once interim residence has been ordered you will have more time to put together an application for shared residence. Fill out the ***C100*** and ***C1A*** **Forms**, and provide a covering letter explaining the details you want to include, keep it to one page, and then take them to the Court and ask for a date, say you'll wait until they confirm an emergency hearing.

14.4.2. If your child is abducted

Returning home to find that your children have been taken and no note left as to their whereabouts is a terrifying situation but you must remain calm. There are a number of options open to you depending on your circumstances; we will assume you have already tried the obvious, such as calling your ex's mobile. **Whatever you do, you must act swiftly.**

You must first read **Practice Direction 12F** which tells you what to do if your child is taken out of the country without your consent and,

- If the country to which your child has been taken (assuming you know) is a part of the Hague Convention and/or the European Convention, you must register the abduction with the International Child Abduction and Contact Unit (ICACU):

  International Child Abduction and Contact Unit
  81 Chancery Lane
  London
  WC2A 1DD

  DX 0012 London Chancery Lane

  Tel: + 44 (0)20 7911 7045 / 7047
  Fax: + 44 (0)20 7911 7248

  Email: enquiries@offsol.gsi.gov.uk

  Outside of normal working hours you should contact the Royal courts of Justice on:

  + 44 (0)20 7947 6000, or
  + 44 (0) 20 7947 6260

  ICACU will forward your application to an experienced solicitor who will take your case on and sort out your legal aid.

- **In Hague Convention cases public funding is not means-tested**. This makes them one area where you are advised to hire a solicitor; establish first that they have experience of abduction cases and a proven track record. This special status does not apply to defendants. You must seek legal advice immediately, both here, and in the country to which your child has been abducted.

- The relevant court procedure is set out in **Chapter 6** of the Family Procedure Rules 2010 which you should read in conjunction with **Practice Direction 12F** and the **Child Abduction and Custody Act 1985**. Bear in mind that in Hague Convention proceedings there may be several defendants pursuant to Rule 6.5.

- The application is made using **Form C67**; your solicitor will fill this out, but you must provide:

  a) the children's names and dates of birth;

  b) the parents' or guardians' names;

  c) the suspected whereabouts of the children;

  d) your interest in the matter, i.e. your relationship to the child and details of any Court Order;

  e) the reasons for your application;

  f) details of any court proceedings (including proceedings not in England or Wales, and including any legal proceedings which have finished) relating to the children;

g) the identity of the person alleged to have removed or retained the child and, if different, the identity of the person with whom the child is thought to be;

h) details of any measures of which you are aware that have been taken by courts or authorities to ensure the protection of the child after its return to the Member State of habitual residence.

- Try to ensure that the proceedings take place in London because this is where you will find the greatest expertise in these cases. Deputy High Court judges and Section 9 judges[403] should not deal with Hague and Brussels II cases.

- The procedure for a location order is as set out above and will be covered by non means-tested public funding.

- Contact the *Reunite* advice line: 0116 2556 234.

- Ask your local MP to contact the All Party Parliamentary Group on Child Abduction.

Britain is very conscientious about returning children to other Hague Convention signatories; many other countries are not. There is nothing you can do about this: states are not bound in any way by the Convention. There is also profound ignorance about the Convention and about Brussels II amongst lawyers in many states, particularly in those which have only recently joined the EU.

[403] These are Circuit Judges authorised to do High Court work under Section 9 of the Supreme court Act 1981.

For non-Hague countries, contact the Foreign and Commonwealth Office, Protection Section, Consular Division: 020 7270 1500. Applications for return are made on **Form C66** to the Principal Registry of the Family Division and are heard in the High Court.

14.4.2.1. The police

You can go to the police, but you need to consider what you want them to do, and this will depend on whether you believe your child to be at risk or not. The police can institute the 'port alert' system (also known as an 'all ports warning') to stop your child being taken out of the country. You must give the police:

a) the child's name, sex, date of birth, physical description, nationality and passport number;

b) the abductor's name, age, physical description, nationality, passport number, relationship to the child, and whether the child is likely to assist him or her;

c) your name, relationship to the child, nationality, telephone number and (if appropriate) solicitor's or other legal representative's name and contact details;

d) the likely destination;

e) the likely time of travel and port of embarkation and, if known, details of travel arrangements;

f) the grounds for port alert, i.e.:

(i) suspected offence under section 1 or section 2 of the Child Abduction Act 1984;

(ii) the child is subject to a Court Order.

g) details of person to whom the child should be returned if intercepted.

If the police find your child, new guidelines following the Victoria Climbié enquiry require that Child Protection Officers should see the child and assess the circumstances before taking them into police protection (this is covered by **Section 46** of the Children Act). The police can keep a child in Police Protection for up to 72 hours; they must inform Social Services as soon as possible, and Social Services are then responsible for finding accommodation for the child. The police do not have to tell you where your child is, but they do have to give you the name of the social worker dealing with your case.

You may be able to persuade the social worker that you are the best person with whom your child should stay, or they may apply to the Court for an Emergency Protection Order, followed by a request for a Supervision or Care Order (this is covered by **Section 33** of the Children Act).

Whatever happens, always keep the police informed and check that the Court Tipstaff is liaising with them.

14.4.2.2. Interpol

If your local police station does not do so, contact Interpol (the police will tell you how) who will help you further to locate your child and advise on how things are handled in the country to which they have been taken. Interpol's main responsibility in this respect is in apprehending fugitives from justice. They may issue an international arrest warrant which is valid in many countries.

14.4.2.3. Passports

Contact the Passport Office in Peterborough (0207 947 7194) and tell them that there is a court prohibition preventing the issuing of travel documents in respect of your child. Note the following President's Direction:

> ***President's Direction on Communication with the Passport Service***
>
> *Where a request is made of or an order is made against the UK Passport Service, the judge should ask the Court to draw up and immediately to provide a copy of the relevant request or order in a separate document to:*
>
> *Family Division Lawyer*
> *President's Chambers*
> *Royal courts of Justice*

Strand, London WC2A 2LL

T: 020 7947 7965
F: 020 7947 7274

*The **Form EX660** should be completed. It will be used by the Court in the production of the order, and should also be sent to the Family Division Lawyer.*

- *The request or order should either state or be accompanied by a letter to the Family Division Lawyer stating the following details in respect of all parties about whom they are seeking information:*
  - *full name including all middle names;*
  - *full date of birth; and*
  - *any known passport numbers.*
- *The **Form EX660** should be completed and used by the Court in the production of the order.*
- *The request or order should state the time by which the information is required, allowing a reasonable period for the Passport Service to investigate and prepare its statement to the court. In the absence of urgent circumstances, a reasonable period shall be four weeks.*
- *The request or order should identify the information required from the Passport Service.*
- *The Family Division Lawyer will then send to disclosure of information officers the enquiry, together with a copy of any request or order made. The disclosure of information officer will be responsible for retrieving the information and forwarding this to the Family Division Lawyer.*
- *The Family Division Lawyer will follow up as required in order to ensure that the information is received by the Court in time, and will receive the statement before forwarding it on as instructed by the judge or court making the request.*

The Court Order should be sent with a covering letter to:

The Caveat Officer
Fraud and Intelligence Unit
Identity and Passport Service
Globe House
89 Eccleston Square
London SW1V 1PN

14.4.3. Locating a child

If there is any chance of locating your child without going to Court you should take that route because this will give you the opportunity of re-establishing your relationship before the system gets involved and ensures its destruction.

If you really wish to go down the court route then you need to make an application for a Seek and Find Order (complete **Form C3**); this may

be amended by the Court to a Seek and Locate Order (complete **Form C4**) because of the presumed danger in which the abducting parent may be placed if the other parent gets to know the new address. In this case the Court would know the address but the applicant wouldn't.

If you do opt for the court route, go to the Court, fill in the application and go before the judge of the day; don't let them give you a hearing date which will inevitably be months in the future.

14.4.4. On the return of a child

Once a child has been returned to England or Wales on the order of a foreign court there will inevitably be further proceedings in the English or Welsh courts. If the child has been made a Ward of Court these will take place in the High Court. If the order of the foreign court is not to return the child but to allow contact then the terms for that will need to be arranged. This is the sort of order a court is likely to make in this situation:

> *UPON both the Plaintiff and Defendant both undertaking (other than by prior joint written agreement lodged with their Solicitors) (a) not to remove the child X from the jurisdiction of England & Wales and (b) not to permit him to reside other than at (such and such an address) until further order of the Court*
>
> *IT IS ORDERED THAT:*
>
> - *The Wardship herein is hereby discharged;*
> - *This matter shall be transferred forthwith from the High Court to the County Court and proceed under the Children Act 1989;*
> - *The Plaintiff and Defendant shall forthwith deliver up their respective passports to their current Solicitors who shall hold them to the Order of the Court pending conclusion of these proceedings;*
> - *The passport of the child shall be held by Messrs ABC solicitors to the Order of the Court pending conclusion of these proceedings or further order;*
> - *The parties shall file statements by 4pm on (14 days) limited to the question of their future plans for care and contact;*
> - *The CAFCASS Officer is requested to report upon the issues of residence and contact by 4pm on (14 weeks) and is to attend the final hearing of this matter unless advised no less than 7 days in advance of the hearing by both the Plaintiff's and Defendant's Solicitors in writing;*
> - *This matter is to be listed before a Circuit Judge for PTR with a time estimate of one hour on the First available date in the week commencing …… and for final hearing time estimate 2-3 days on a date to be fixed by Counsel's clerks;*
> - *Pending final hearing the child ….. shall reside at ….*

- *Contact ……*

If you have been through the process of securing the return of a child you will be keen to ensure that your child is not abducted again. One option is relatively unknown: to have the potential abductor tagged.

The principle was first established in **Re C (Abduction: Interim Directions: Accommodation by Local Authority) [2003] EWHC 3065 (Fam),** [2004] 1 FLR 653 which forms part of the Cannon case detailed below. At the time there was no specific procedure; since then a procedure has been devised by the President's office whereby tagging can be arranged through the Tagging Team of the National Office for the Management of Offenders. Orders must follow this schedule of information:

1. An order needs to be made and sealed by 3.30pm on the day before its implementation.

2. A representative will attend the premises to install the device the next day. The order must contain the following information:

   (i) The full name of the person(s) to be tagged.

   (ii) The full address of the place of curfew.

   (iii) The date and time at which the tagged person agrees to be at home (or any other relevant places) for the installation of the monitoring device.

   (iv) A schedule of the times at which the Court expects the person to be at home (or any other relevant places) so that the service can monitor compliance.

   (v) The start date of the curfew and, if known, the end date of the curfew, the days on which the curfew operates and the curfew hours each day.

   (vi) The name and contact details of the relevant officer to whom the service should report if there is any breach of the above schedule or if the person appears to have removed the tag.

Also refer to the case of **Re A (Family Proceedings: Electronic Tagging) [2009] EWHC 710** which utilised this schedule. A sample order is appended to the judgement.[404] A mother had twice abducted a child. The child was now in the father's care and the mother sought an order for contact; the father feared she would again abduct the child and it was eventually agreed between them that she should be tagged.

[404] http://www.familylawweek.co.uk/site.aspx?i=ed34502

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14.5. Hague Convention Cases

All applications to return under the Hague Convention must be made to the High Court.

The **Hague Convention** (Article 12) demands that:

1. When proceedings commence within a year of removal the child must be returned.

2. When a year has elapsed the child must be returned *unless it can be demonstrated that he is 'settled in his new environment*.

Where a year has elapsed, therefore, abduction cases depend on how the courts interpret the expression 'settled in his new environment'. The expression has two components:

1. A *physical* element of relating to and being established in a community and an environment.

2. An *emotional* and *psychological* component denoting security and stability (this was established by Thorpe LJ in Cannon v Cannon at paragraph 61).

The defendant must be able to show that the present situation 'imports stability when looking into the future'. The judgement in Cannon v Cannon gives a review of the relevant authorities at paragraphs 22 to 25. The term 'new environment' encompasses place, home, school, people, friends, activities and opportunities but not, per se, the relationship with the defendant parent: see Re N (Minors) (Abduction) [1991] 1FLR 413 per Bracewell J at 417H-41HB.

Where a period of less than a year has elapsed the child's welfare remains paramount, and the Hague Convention principle cannot be applied automatically or mechanically; see Neulinger and Shuruk v Switzerland (Application no. 41615/07) ECHR in which it was determined that ordering the return of a child to Israel would breach the Article 8 rights of mother and child.

Where a period greater than a year has elapsed the Court must consider the reason for this delay, particularly where the defendant parent has concealed the whereabouts of the child from the other parent; see Re H (Abduction: Child of Sixteen) [2000] 2FLR 51 and Cannon v Cannon. In such cases the onus on the defendant to demonstrate 'settlement' is greatly increased. The Court must look critically at claimed settlement which has been built on concealment and deceit, particularly where the defendant is a fugitive from justice in their home country. Note also that Article 13 of the Convention states that return is not required where it would 'expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.

The Court will be influenced by the degree to which parent and child are acting as fugitives in hiding from justice, and the attachment of the parent to the new country – whether through marriage, family, employment, etc.

It appears to be the case, reviewing the relevant judgements, that courts will place greater emphasis on Thorpe's first constituent,

physical integration, than on his second, emotional stability. Consider Mrs Justice Bracewell's throwaway comment in Re N (Minors) (Abduction) [1991] 1 FLR 413, 418C that the abductor's status 'had to be as permanent as anything in life could be said to be permanent'. Many of these children are clearly far from emotionally stable, yet the courts do not seem to associate that with the fact of their abduction, regarding it as normal in teenagers, for example, and entirely consistent with the concept of 'settlement' under the Convention. Thus Thorpe can say with no sense of self-contradiction,

> *While it is plain that A has had a history of trouble from persistent bullying by and a number of emotional disturbances, neither factor goes to the question whether or not she is physically settled into the community in which she has lived for 5 years. I find that she is so settled.*

Thorpe says that the Court must balance the degree of wrongdoing (or 'turpitude') committed by the defendant against the extent to which the 12 month limit has been exceeded: if the abductor conceals their whereabouts for long enough, that will outweigh any degree of turpitude. The Court must also consider the difficulty of re-introducing the other parent into his child's life at this late point (such 'difficulty' is usually vastly overstated).

The Court of Appeal may often remit these cases to the Family Division (and a report by CAFCASS) to determine where the balance lies. The parent trying to re-establish contact with his child must recognise that judges like Thorpe deem breach of court-ordered custody of greater 'turpitude' than frustrating a child's relationship with one of his parents.

Thorpe emphasises that although the Hague Convention provides 'a swift and summary procedure' for the return of a child, preventing an abducting parent from gaining advantage through their wrongdoing, an order for return must not be 'an automatic response'. Although the courts in a child's country of origin are best placed to decide matters of custody, once sufficient time has been spent in the new country they are no better placed than the courts there because the evidence on which such a case must be decided has now shifted to the new country.

We finally look at two cases in which the Court *has* exercised its discretion to order the return of a child. In Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716 Balcombe J ruled that in normal circumstances it is generally in a child's best interests promptly to be returned and that only in exceptional cases should a court exercise its discretion *not* to return. The court should consider a child's views as likely to be influenced by the abductor (that is, the child will have been alienated, or even be demonstrating Stockholm Syndrome-type behaviour) – and by the knowledge that return could result in the abductor's arrest and imprisonment – and little weight should be given to them.

This principle is only overturned by the demonstration that the child's views are clearly his own, and that determination will depend heavily on the report by CAFCASS.

Thorpe approved Balcombe's observation in Zaffino v Zaffino (Abduction: Children's Views [2005] EWCA Civ 1012, [2006] 1 FLR 410. This case involved a French couple: in 2002 a French court ordered the mother residence and the father contact. The father appealed

the order, but relocated to the UK prior to the hearing, at which the appeal was dismissed. Contact continued intermittently. In 2005 the father and son, both now in the UK, jointly applied for a variation of the order; the mother countered with an application for sole residence which was granted, she also applied under the Convention for the son's return.

In February 2006 the High Court found that the son objected to the return; he was of sufficient age and maturity for his views to be taken into account, the judge did not order return, exercising his discretion under Article 13, Paragraph 2 of the Convention,

> *The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.*

The mother appealed. In the Court of Appeal Lords Justice Thorpe and Wall allowed the appeal and ordered return. The trial judge had erred in exercising his discretion and had given insufficient weight to the order of the French court; the strong presumption was that children should be returned. Discretion to refuse return could only be used in exceptional cases (see Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242), and although the child's opinion carried weight, the abduction was patent, it was clearly a French case, and French proceedings were on-going. The trial judge had satisfied the requirement that he be 'plainly wrong'.

14.6. Advice to foreign fathers

There has been a number of cases where fathers have come to the UK to seek their children following abduction by the mother. The problem for many fathers is that the world is a big place, and the UK may not be the first country in which they search. Sometimes the mother may have family or other connections in the UK, but very often the father will come here as the result of a tip-off, and it may be several years since he last saw his children. If the children are 'settled' the courts will be very reluctant to take any action; the best such fathers can hope for sometimes is monetary compensation.

You should refer to **Practice Direction 12F** which tells you what to do if your child is brought into England or Wales without your consent,

If the country from which you come is a signatory to the 1980 Hague Convention you should contact the 'Central Authority' in that country to make an application for the return of your child to the Central Authority for England and Wales. You can also contact the Central Authority for England and Wales direct, or instruct a lawyer to do it for you, and you will then get legal aid to help you.

In England and Wales the Central Authority is the Lord Chancellor and his duties are carried out by ICACU (**see above** for how to contact them).

14.6.1. Case study: Cannon

The best known case to which to refer a foreign father is that of Josef Cannon (**Cannon v Cannon [2004] EWCA Civ 1330**, [2005] 1 FLR 169).

Josef is a black American comedian/actor/producer/director/writer whose daughter Shelby was abducted by her mother, Catherine, and taken to Ireland where the mother took a dead child's name from a graveyard and created a new identity for her daughter, including celebrating Shelby's birthday on the dead girl's birthday, so that Josef could not discover her whereabouts.

In an *ex parte* hearing in 1999 the Superior Court of Los Angeles granted Josef full legal custody of Shelby while the Court in Dublin ordered the mother to return her daughter to the US under the Hague Convention. The LA District Attorney's Office issued a felony arrest warrant against the mother for kidnapping.

Josef, however, did not know his daughter's whereabouts. In 2001 Shelby was identified by a school friend who had read about her in the Irish Times. Shelby's mother fled into hiding.

Josef finally managed to track down his daughter and in November 2004 he sought to appeal an earlier decision by Mr Justice Singer at the Court of Appeal before Thorpe, Waller and Kay LLJ under the Hague Convention. Singer had ruled,

> *(i) when determining whether a child was settled in the new environment for the purposes of Article 12 of the Convention on the Civil Aspects of International Child Abduction (The Hague, October 25, 1980), regard was to be had only to the physical characteristics of settlement;*
>
> *(ii) in proceedings commenced more than a year after wrongful removal, and where the child was settled, there was no residual power or discretion under the Hague Convention to order return. Article 12 of the Hague Convention, scheduled to the 1985 Act, provides:*
>
> *"Where a child has been wrongfully removed or retained … and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful remove or retention, the authority concerned shall order the return of child forthwith.*
>
> *"The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year … shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."*

In the Court of Appeal Lord Justice Thorpe allowed the appeal, saying that there were two issues.

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First, what was the proper construction of the phrase "the child is now settled in its new environment",

Second, once the defendant had proved that the child was "settled in its new environment", did the Court nevertheless retain a residual discretion to order the child's return?

In his skeleton argument for the hearing before Mr Justice Singer, Mr Michael Nicholls, as ***amicus curiae****, wrote: "Each case should be considered on its own facts, but it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return,"*

His Lordship said that he supported that submission. A broad and purposive construction of what amounted to "settled in its new environment" properly reflected the facts of each case, including the very important factor of concealment or subterfuge that had caused or contributed to the asserted delay.

There were two factors that needed to emphasised: First, concealment or subterfuge in themselves had many guises and degrees of turpitude. Abduction was itself a wrongful act, in that it breached rights of custody, but the degree varied from case to case.

Furthermore, abduction might also be a criminal offence in the jurisdiction where it occurred. The abductor might have been prosecuted, convicted, and even sentenced in absentia. The abductor might have entered the jurisdiction of flight without right of entry or special leave. The abductor might therefore be, or might rapidly become an illegal immigrant.

His Lordship said that he drew a parallel between an assertion that a child had become settled in a new environment and the English case law regarding the acquisition of habitual residence. There was obvious common ground between proving that a child was settled in a new environment and proving the acquisition of an habitual residence in the new environment. The decision of Sir George Baker, President, in Puttick v Attorney-General (119801 Fain 1) clearly established that a fugitive from foreign justice would not acquire habitual residence in this jurisdiction simply by reliance on a temporal period during which the claimant had outwitted authority.

The second factor was the impact of concealment or subterfuge on an assertion of settlement within the new environment. The fugitive from justice was always alert for any sign that the pursuers were closing in and equally in a state of mental and physical readiness to move on before the approaching arrest. His Lordship said that that consideration, among others, compelled him to differ from the opinion of the Full court of

Australia in Director-General, Department of Community Services v M and C and the Child Representative ([1998] FEC 92-829) rejecting previous acknowledgment that there were two constituent elements to settlement, namely a physical element and an emotional element. To consider only the physical element was to ignore the emotional and psychological elements which in combination comprised the whole child.

A very young child took its emotional and psychological state in large measure from that of the sole carer. An older child would be consciously or unconsciously enmeshed in the sole carer's web of deceit and subterfuge.

In summary, his Lordship said that he unhesitatingly upheld the well-recognised construction of the concept of settlement in the second paragraph of Article 12 which was that it was not enough to have regard only to the physical characteristics of settlement. Equal regard had to be paid to the emotional and psychological elements.

In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement was much increased. Judges should not apply a rigid rule of disregarding the second paragraph of Article 12 but they should look critically at any alleged settlement that was built on concealment and deceit especially if the defendant was a fugitive from criminal justice.

Even if settlement was established on the facts, the Court retained a residual discretion to order a return under article 18 of the Convention.

The appeal itself (Re C (Abduction: Settlement) (No2) [2005] 1 FLR 938) under Kirkwood J failed because the Court believed the child to be sufficiently 'settled in her new environment', setting the bad precedent that recovery under the Convention can be defeated if one hides the child abroad for long enough. Kirkwood declined to exercise his discretion to order return, saying,

Considering the court's discretion, I have particular regard to: (a) the purposes of the Hague Convention; (b) the mother's wrongdoing; (c) the injustice to the father; and (d) the welfare of S. The Convention serves to discourage child abduction, removal by a parent acting unilaterally of a child … to another state where it is in breach of another parent's rights of custody in respect of the child. Such action is recognised to be against the welfare interests of the child. Parental disputes about the child must be resolved in the courts of the child's home territory.

In 2006 Joseph brought the case back to court as Re C (A Child) [2006] EWHC 1229 (Fam) where it was heard before the President of the Family Division, Sir Mark Potter.

In the High Court Hague Convention hearing the mother's defence was:

- Removal of the child could not be a breach of the custody order in favour of the father because the order was made after removal.
- The child was 'settled in her new environment.'
- Return to the US would expose the child to physical or psychological harm.
- The child, now aged 14, objected strongly to return.

Potter found the father's claim that the mother had breached the 1999 custody order was false because she had been unaware of the order, though she had breached Article 3; the father's credibility was thus damaged.

Potter argued that for a child to be 'settled' in her new environment required two factors to be satisfied: she must be physically established in her new community, and she must be emotionally and psychologically secure and stable. He found the first requirement to be fulfilled: the girl was integrated into a small community of friends and relatives by her mother's marriage. The fact that she was 'unsettled' psychologically did not demonstrate that she was not 'settled' for the purposes of the Convention, despite the fact that there was some doubt over their immigration status. This shows how different Hague states interpret the imprecise wording of the Convention differently.

The girl's objections to return were deemed to be hers and not her mother's and that finding made it unnecessary to determine whether the defence of risk of harm was established or not.

Potter therefore declined to order the girl's return saying that it would uproot her at a vulnerable age and destroy the attempts of her family (i.e. her mother) to establish stability.

Josef now has regular contact with his daughter, but she remains in London while he lives in California. Shelby's mother faces kidnapping charges should she ever return to the US.

14.7. Cases

C v S [1990] 2 All ER 961
Re J [1990] 1 FLR 276
Re N (Minors) (Abduction) [1991] 1FLR 413
Re B-M [1993] 1 FLR 979
R v Dootson [1994] Crim LR 702
Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716
Re D (Minors) (Residence: Imposition of Conditions) [1996] 2 FLR 281
R v Newsome [1997] 2 CR App R [S]69
Re E (Residence: Imposition of Conditions) [1997] 2 FLR 638
Re J [1999] 2 FLR 653
Re H [2000]1 FLR 766
Re H [2000] 2 All ER 1
Re H (Abduction: Child of Sixteen) [2000] 2FLR 51
Payne v Payne (2001) 2 WLR 1826
Re S (A Child) [2001] EWCA Civ 847, [2001] 3 FCR 154 and **[2002] EWCA Civ 1795**, [2003] 1 FCR 138
Re C (Child Abduction) (Unmarried Father: Rights of Custody) [2002] EWHC 2219, [2003] 1 FLR 252
Re F (Shared Residence Order) [2003] 2 FLR 397
Sylvester v Austria (App Nos. 36812/97 & 40104/98) [2003] 2 FCR 128, [2003] 2 FLR 210
Cannon v Cannon [2004] EWCA Civ 1330, [2005] 1 FLR 169
Re Y [2004] 2 FLR 330
Re C (Abduction: Settlement) (No2) [2005] 1 FLR 938 (Cannon v Cannon)
Zaffino v Zaffino (Abduction: Children's Views [2005] EWCA Civ 1012, [2006] 1 FLR 410
Re C (A Child) [2006] EWHC 1229 (Fam)
Re B (A Child) [2007] EWCA Civ 1055
M v H [2008] EWCA Civ 324 (Fam)
Re S-R (Jurisdiction: Contact) [2008] 2FLR 1741
Re W (Children) [2009] EWCA Civ 160
Re L (A Child) (Internal Relocation: Shared Residence Order) [2009] EWCA Civ 20; also reported as **Re T (A Child) [2009] EWCA Civ 20**
AP v TD [2010] EWHC 2040
Re D (Children) [2010] EWCA Civ 50
Re F (Children) [2010] EWCA Civ 1428
C v D [2011] EWHC 335 (Fam)
Re H-K (Children) [2011] EWCA Civ 1100
Re K (Children) [2011] EWCA Civ 793

CHAPTER 15: SCOTTISH LAW

> *The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results.*

Lord Justice Sachs[405]

15.1. Relocation, Relocation

15.1.1. Advantages

It is unfortunately routine for parents who wish to prevent contact to move to Scotland and thus out of the jurisdiction of the English and Welsh courts. Sometimes such a move need only be temporary if it is sufficient to put an end to contact. Scotland has now become the haven of choice for the fugitive from family justice; harbouring abductors and throwing up obstructions to the 'foreign' English parent trying to locate his child and restore contact.

The advantages of moving to Scotland to the abducting resident parent are several:

- To try and get contact/residence proceedings going, or an effort to return your children to their 'habitual residence', you must establish the jurisdiction for the case. If you haven't had on-going proceedings in a family matter in the English or Welsh courts, it will now become difficult for you. The resident parent will argue that the appropriate jurisdiction is Scotland (to make it impractical and expensive for the non-resident parent to litigate in Scotland), and the non-resident parent will argue it's England (or

[405] Poel v Poel [1970] 1 WLR 1469

Wales). As time passes, a new *status quo* is established, which makes it certain that the children will not be returned to their habitual residence (in accordance with the Family Law Act 1986). If there were already proceedings in the English courts you may still find that the proceedings are transferred to Scotland as this has now become the children's habitual home.

- Even if you manage to get the Scottish courts to relinquish jurisdiction to the English courts, proceedings will be more difficult with additional delay, etc. As the lower English courts do not have jurisdiction in Scotland matters have to be dealt with through the High Court, which has a much greater case backlog than County Courts or the Principle Registry of the Family Division.

- Use of a McKenzie Friend in Scotland is far more restricted than it is in England and Wales. From June 2010 McKenzies have been allowed into the higher Court of Session following an energetic campaign, but not into the lower Sheriff's Court where most cases are heard. If you are refused use of a McKenzie you will either be forced to spend money on a solicitor – if you can't get legal aid – or you will have to represent yourself alone. Not a thrilling prospect in a foreign jurisdiction.

- If the English courts retain jurisdiction they must rely on CAFCASS sending its staff to Scotland to do reports – and in removal/ abduction cases of this nature, court reports are always needed – because CAFCASS does not extend to Scotland, and Scottish CWOs (court Welfare Officers) cannot prepare reports for the English courts. This means further delays and a lack of enthusiasm by CAFCASS for your case; they will try and make it 'go away' by siding with the resident parent, or by politely suggesting to you that you would be better off relocating to Scotland (in which case your children's other parent is likely to up-sticks and return to England; it's a never ending game for them).

- Once your case has been transferred to the High Court it is unlikely that the Court will order the children to be moved back across the border. A new *status quo* has been established, arguing for not dislodging the children again, as well as the fact that the Court can order the resident parent back to England and Wales, but that means they can set up a tent one yard from the border, inside England. That does not bring them closer to you, if and when you get a Contact Order. The travel time and costs are ruinous. To see your children for 3 hours in a contact centre (which are very few-and-far-between in Scotland) you could end up spending a whole weekend travelling and several hundred pounds.

- Even if you obtain an order from the High Court, if you seek enforcement of it in Scotland it will have to be 'registered' with the Court of Sessions (the Scottish High Court); delays can take many months, and it is often the case that even registered orders do not get enforced by the Sheriffs (Scottish judges). There is also, shamefully, a degree of racism in the Scottish family justice system, and English non-resident parents have been viewed as trouble makers coming to Scotland to abduct 'Scottish' children and have even been referred to by the sheriffs as 'foreigners'.

- The education system and laws are different in Scotland. You may not receive school reports or medical reports unless you get an order from an English court which must then be 'registered'.

By the time you're financially, physically, and emotionally exhausted you will reach the conclusion that you must either give up or move to Scotland.... and that implies a change of career, etc. Of course, it works both ways, and the following is a vital precedent for both Scottish and English fathers.

A Scottish father and an English mother set up home in Scotland with their children. When the mother decided to leave the father she planned things very carefully: from the English court she obtained an *ex parte* Residence Order, a Prohibited Steps Order to prevent the father removing the children, and an injunction on the father to prevent him instituting proceedings in Scotland. With everything safely in place she then began divorce proceedings.

The father appealed[406] and the Court allowed the appeal: Butler-Sloss LJ held that the Circuit Judge had been wrong to decide the children had not been 'habitually resident' in Scotland, therefore, under Schedule I, 8(1) of the Domicile and Matrimonial Proceedings Act 1973 the father's petition in the jurisdiction where the children were habitually resident took precedence over the earlier petition in the new jurisdiction. The mother's proceedings were stayed; the Scottish court had jurisdiction.

15.2. Preventing Removal

The Family Law Act 1986 was supposed to harmonise UK law with the requirements of the Hague Convention, the European Court of Human Rights, etc, and to prevent the removal of children from one country to another. Like the Children Act's provisioning for shared residence, however, which is habitually ignored by the courts, so is this Act disregarded whenever a resident parent decides to take the children to Scotland. If your children had been abducted to France, for example, they would have been ordered to be returned to the jurisdiction of England and Wales; but if they are abducted to Scotland (also a 'foreign' jurisdiction), they will be allowed to remain there; indeed removal to Scotland is not legally regarded as abduction.

Because of this legal anomaly, the courts in England will allow you to apply for a Prohibited Steps Order to prevent removal from the jurisdiction, and they will grant it, but it will not actually be worth anything if the intended removal is to Scotland, and a parent who is aware of this will relocate with impunity. It's worth getting the order, in case the parent intends to move elsewhere or is unaware of its futility, but a solicitor ought to advise a client to ignore it.

[406] M v M (Abduction: England and Scotland) [1997] 2 FLR 263

15.3. Scottish Legislation

15.3.1. General

The historical origins of Scots law are not found in the English Common Law but owe much to the continental systems of civil law, and to Roman Catholic law. It follows that the 'judicatories of Scotland and England are as independent of each other within their respective territories as if they were the judicatories of two foreign states'.[407] Although the Treaty of Union 1706 created a single monarchy and Parliament for Great Britain, the Union legislation sought by various means to ensure the continued existence of the Scottish legal system, even though the House of Lords (and now the Supreme Court) has sat as the final court of appeal in civil matters from both jurisdictions.

Some legislation in Scotland is the same as in England; some is different. The Children Act 1989 does not apply and its counterpart is the more-or-less similar Children (Scotland) Act 1995; the most obvious difference is in the numbering of sections. Orders for residence and contact are made under Section 11 of this Act. The Family Law Act 1986 does apply.

Civil Procedure in the Sheriff Courts is governed by the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, SI 1993/1956. The scope includes all or nearly all private law family proceedings.

[407] Orr Ewing's Trustees [1884] 11 R 600 at 629 (court of Session, Lord President Inglis)

15.3.2. Responsibilities & rights

Under the English and Welsh Children Act 'Parental Responsibility' is effectively a question of the rights and authority a parent has over a child. The Children Act (Scotland) 1995 makes the distinction between rights and responsibilities. In Scotland a parent has the *responsibility* (Section 1),

a) *to safeguard and promote the child's health, development and welfare;*

b) *to provide, in a manner appropriate to the stage of development of the child—*

(i) direction;

(ii) guidance,

to the child;

c) *if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and*

d) *to act as the child's legal representative,*

He has the *right* (Section 2),

(a) to have the child living with him or otherwise to regulate the child's residence;

(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;

(c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative.

Note: how very different this is from the English and Welsh legislation in which a parent has no rights. In Scotland **a non-resident parent has the right to maintain direct contact on a regular basis**, and it is also his **responsibility** to do so. In England and Wales a non-resident parent has no such right or responsibility, and a court cannot order him to have contact if he is unwilling; his only responsibility under the law is to be fleeced for child support.

A child's mother always has these responsibilities and rights under Scottish law; if you are a father you only have them if married to the mother at the time of conception (Section 3(1)(b)). If you are not married you can also acquire these responsibilities and rights through being registered on the birth certificate as the father but only if the child was born after 4th May 2006 which is when the Family Law (Scotland) Act 2006 came into force. You can also acquire them through making a formal agreement with the mother (Section 4), and the Court can make an order either conferring these responsibilities and rights or depriving you of them (Section 11).

Parental rights and responsibilities end when a child reaches 16. The responsibility to give a child guidance lasts until they reach 18.

15.3.3. Openness

There is an extraordinary – and overlooked – disparity between English and Welsh family law and Scottish family law, to the extent that it may constitute discrimination under Article 14 of the European Convention on Human Rights. The adversarial court hearings which in England have until very recently been conducted *in camera* are open in Scotland unless there are good reasons why they should be heard in private. This dates back to an Act of 1693 which provides that the Court should sit with 'open doors'.

Run-of-the-mill residence and contact cases are routinely public in access to the Court, judgement and reporting, at all levels of the Court and there is thus no damage to the administration of justice. However many other hearings, such as conciliation hearings and preliminary hearings which do not require a judge to adjudicate, are heard *in camera*.

There are no separate rules analogous to the Family Proceedings Rules 1991 or Family Procedure Rules 2010. Subject to certain changes which occurred with the enactment of the Children (Scotland) Act 1995 there are no express provisions for private hearings and thus no analogues to County Courts Rules 1981 rule1(4) (the rule enacting the presumption that ancillary relief proceedings will be in chambers in the County Courts), Family Procedure Rules 1991 rule 2.66(2) (ditto if the case was before a Circuit Judge), rule 27.11 of the Family

Procedure Rules 2010, rule 3.9(1) (Pt. IV Family Law Act 1996 proceedings in chambers), and rule 4.16(7) (Children Act proceedings in chambers). The norm is open court, with parties and children named in all 'family actions', and free reporting.

The Social Work (Scotland) Act 1968 introduced the Children's Hearings and Panels, which are entirely public law and not regulated by rules in the Ordinary Cause Rules. Adoption proceedings are not included and s.57 of the Adoption Act 1978 provides that adoption proceedings will be heard in private unless the Court decides otherwise.

15.3.4. The welfare principle

The Welfare Principle of English law since 1925, making the child's welfare the court's paramount consideration, is also a principle of Scottish law, now enacted in s.11(7) Children (Scotland) Act 1995 which replaced s.3(2) of the Law Reform (Parent and Child) Act 1986.

Section 11(7) requires that when considering whether or not to make an order regarding parental responsibilities, parental rights, guardianship, administration of a child's property, and Section 11 orders for residence and contact, etc, the Court 'shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none shall be made at all'.

The Act also requires the Court to give the child the opportunity to express his views and to take his views into consideration, while taking account of his age and maturity.

15.3.5. Section 11 orders

In Scotland legal terminology is different: what we would in England call a judgement is called an 'opinion'. The Scottish equivalents to the English Section 8 Orders are made under Section 11 of the Children (Scotland) Act 1995. This Act led to some necessary amendment of the Sheriff Court Ordinary Cause Rules 1993 in so far as family actions were concerned, effected by the Act of Sederunt (Family Proceedings in the Sheriff Court) 1996, SI 1996/2167.

'Parental rights' became substituted by 'section 11 order' since Section 11 of the Children (Scotland) Act 1995 defined, in particular, Residence Orders [s.11(2)(c)], Contact Orders [s.11(2)(d)], Specific Issue Orders [s.11(2)(e)], and under s.11(2)(f) an interdict analogous to the 1989 Children Act Prohibited Steps Orders.

The title of Section 11 is 'Court Orders Relating to Parental Responsibilities, Etc'. The interpretation provisions of rule 33.1(1) (2) were suitably amended: it is only necessary to note here that rule 33.1(1) (h) – 'an action or application for any parental rights' – was substituted by:

> *'(h) an action or application for, or in respect of, an order under section 11 of the Children (Scotland) Act 1995 (Court Orders relating to parental responsibilities etc.), except - ….'.*

Part I of the Children (Scotland) Act ('Parents, Children and Guardians'), comprising sections 1-15, is the private law part of the Act, regulated by the 1993 Ordinary Cause Rules as amended. Part II ('Promotion of Children's Welfare by Local Authorities & by Children's Hearings Etc') is the public law part and not regulated by the 1993 Rules. S.91 of the Act gives a specific rule-making power for Part II, but there is none in the Act for Part I because Private Law proceedings come within the 1993 Rules for general civil actions. There are stringent publicity restrictions [s.44(1)] for Part II proceedings with Children's Hearings and Panels, which sit in private [s.43(1)], and the non-identification restrictions extend to appeals as well [s.44(1)].

15.3.6. The views of the child

The Scottish courts will not make an order until the child has been given an opportunity to express his or her views. The sheriff (the judge) must then give due weight to those views, having due regard to the child's age and maturity. The child's views must be recorded in writing. Rules 33.19 & 33.20 of the 1993 Rules were substituted by SI 1996/2167.

If a child wishes to express his views he should indicate that he wishes to do so using **Form F9**.

If the child indicates that he wishes to express his views the sheriff must order such steps to be taken as he considers appropriate to ascertain the views of that child. The sheriff should not grant any order unless the child has been given the opportunity to be heard, and unless due weight has been given to the views expressed.

Where the child expresses a view on a matter affecting him either personally to the sheriff or to a person appointed by the sheriff or provided in writing the sheriff, or the person appointed by him, must record the child's views in writing and direct that such views, and any written views, given by a child shall:

a) be sealed in an envelope marked 'Views of the child - confidential';

b) be kept in the court process without being recorded in the inventory of process;

c) be available to a sheriff only;

d) not be opened by any person other than a sheriff; and

e) not form a borrowable part of the process.

There is no presumption that the sheriff will keep the child's recorded views to himself, etc, but clearly these rules do permit the taking of secret evidence from the child even to the extent of keeping it secret from the parties and their representatives.

15.3.7. Exclusion orders

The law on exclusion orders in Scotland is less draconian than in England and Wales. Under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 a spouse or cohabitant can be excluded from the family home and prevented from approaching the applicant spouse. The order will be granted 'where it appears to the Court that the making of the order is necessary for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child.' An order can be granted on an interim basis as long as the respondent is given the opportunity to be heard by the Court.

The Protection from Abuse (Scotland) Act 2001 enables a respondent to be arrested for breach of an interdict without warrant if the arresting officer has reasonable cause for suspecting that person of being in breach of the interdict and considers that there would, if that person were not arrested, be a risk of abuse or further abuse by that person in breach of the interdict. By obtaining the interdict the applicant has satisfied the Court that the power of arrest is justified. The Scottish system provides a better balance between complainant and accused than the English system, recognising that excluding an individual from his home is a significant step and demands appropriate respect for correct procedure and evidence.

15.4. Taking your Case to Scotland

15.4.1. The levels of court

There are two levels of Family Court in Scotland: the **Sheriff Courts** and the **Court of Session**. Sheriffs are somewhere between district judges and High Court judges and sit alone, hearing evidence and issuing orders. The Court of Session, in Edinburgh, is the supreme civil court and consists of an Inner House, which deals with appeals, and an Outer House which deals with primary legislation, including family law. Cases are heard by three judges.

At the time of writing you can be represented by a solicitor and receive public funding even if you are resident in England (qualification criteria are much the same as in England), and by a barrister, though the latter is known as an 'advocate'. The Sheriffs Court is cheaper, because lawyers cannot charge so much there, but its jurisdiction is limited, so if you want an English order enforced in Scotland you are better off going to the Court of Session, though you will then need to stay in Edinburgh. Correspondingly, orders made in the Sheriffs Court will not be respected in England. There is widespread evidence that you will encounter poor practice and prejudice (against non-resident parents and against the English) in the Sheriffs Court.

If you need to find a solicitor in Scotland, go to the website of the Scottish **Family Law Association** which has a simple search facility by postcode.

15.4.2. Representing yourself

A party who conducts his own litigation is known as a '**Party Litigant**' in Scotland; if you are English you will find this approach more difficult than in England; the system is designed to support the lawyers' monopoly. Clerks of the Sheriffs Court and the General Department of the Court of Session can give you advice on procedure. Go at quiet times in the afternoon and not in the much busier morning session. Sheriff Court procedure is published in *Ordinary Cause Rules: Second Edition* by McCulloch, Laing and Walker; procedure in the Court of Session is published in *Green's Annotated Rules of the Court of Session* by Nigel Morrison.

The use of McKenzie Friends is not as well established in Scottish courts as it is in English and Welsh ones. They weren't accepted into the Court of Session until mid June 2010 (40 years after being accepted into the English court) following the Lord President's Act of Sederunt. The courts prefer the term 'lay assistant' to McKenzie Friend, and the rules are much the same as for the English courts. At the time of writing, however, they have still not been accepted in the Sheriff courts which is where most cases are heard. Up-to-date information on this issue is provided on his **blog by Peter Cherbi**.

You will have to apply to the Court to use a McKenzie via a motion roll (see below), and pay a sum of £45. You must refer to the use of a 'lay assistant'.

Scottish judges are a dour and humourless lot, and will not tolerate displays of frustration or emotion. You must remain absolutely in control and be very polite and respectful.
Be aware that in Scotland costs are much more likely to be awarded, and yours are likely to be higher (you will have to pay for the welfare reports) if you are the father.

15.4.3. Enforcing an order

If you already have an English Court Order you will need to have it registered in Scotland; the clerks at the English court which made the order will tell you what to do. Because the Hague Convention on child abduction failed to include Scotland as a jurisdiction separate from England you will then have to make a further application to the Court of Session in order to enforce it.

15.4.4. Making an application

If you do not have an English order you can still apply for one in an English court – which the Court may agree to do and which will be easier for you – and it will then be easier to have it enforced in Scotland. You need to be careful adopting this approach, because Scottish judges will be offended if you have used the English system rather than theirs, and if the English court has acted as if it had jurisdiction in Scotland. Make it clear that the decision was the Court's and not yours. As applicant you will be referred to as the '**Pursuer**' and the respondent is the '**Defender**'.

You must first issue a 'Summons' – sometimes called a 'Writ' – under the 'Ordinary Cause' procedure, and it must be worded in a particular formal way acceptable to the Court; there are no forms equivalent to the English C100 to make the process easy for you. The **Ordinary Cause rules** are available from the Scottish Courts website and the family procedure rules are **available here**. Try to keep the Summons as brief and to the point as possible. It will have three sections:

- The **Conclusions** – the order you are applying for, i.e. for residence or contact, dates and times, etc.
- The **Condescendences** – this is similar to the statement made to an English court, and supports your application, giving your evidence.
- The **Pleas-in-Law** – the legal argument in support of your application; this should be brief, and argue the main principles of the Children Act, i.e. that it is in the child's best interest to have contact with both parents and that an order be made rather than that no order be made.

It is worth paying a solicitor to help you with this, even if you intend to represent yourself: you must get the wording correct. The Summons must be 'signetted' (signed) and 'registered' at the Sheriff Court or 'lodged for calling' at the Court of Session; there is a **fee payable** of £140. The Defender must then lodge a notice of intent to defend and lodge their Defences which is the official response to the Condescendences. In this document they must answer every point you have raised, and either admit or defend it; anything not specifically denied is assumed to be admitted. The Defender must also pay a fee of £140. If your children's other parent is English and has moved to Scotland in order to prevent contact they will find this process almost as challenging as you will.

You will then be given a period of time in which to alter your Summons in response to what has been claimed in the Defences, and the Defender will then be allowed time to alter their Defences. Each side must indicate clearly what has been changed. The Scottish courts are stricter than the English courts, and so neither side should be able to ambush the other with new claims or evidence. It is your responsibility as Pursuer to keep a record of all these changes, from both sides, and to lodge it with the Court prior to the first hearing.

15.4.5. The options hearing

The first hearing, equivalent to an English Directions hearing, is the 'Options' hearing; it may have been preceded by a child welfare hearing. Note that hearings in Scotland are sometimes called '**diets**'. Rule 33.22A enables the convening of a Child Welfare Hearing; this effectively replaces the Conciliation/Directions Appointment in the English courts.

The sheriff clerk must fix a date and time for a Child Welfare Hearing as soon as possible and not later than 21 days after the defender (respondent) lodges their notice to defend or oppose an application for a section 11 order or makes their own application for a section 11 order. The sheriff can also order such a hearing at his own discretion or on the request of a party.

The sheriff clerk must then inform the parties of the date for the Child Welfare Hearing using Form F41. You can still make a further application to the court after that date has been set.

The Child Welfare Hearing may be held in private. Its purpose is to establish what matters are in dispute and to try to achieve resolution of them. The sheriff can make an order then, or order that steps (analogous to English 'directions') be taken as appropriate. You are expected to attend the hearing and to provide the sheriff with sufficient evidence to enable him to conduct the hearing.

The Court may then order a report, and there may be another Options hearing. There will then be a 'proof diet' or 'diet of proof' during which evidence is heard and witnesses are cross-examined. Finally the judge will make whatever order(s) he considers necessary, issued on a sheet of paper known as the '**Interlocutor**'.

At any time during the process you can request an interim measure, such as contact at a particular time, or the equivalent of a prohibited step, e.g. to prevent removal from the jurisdiction. This request is known as a 'motion' and is considered at a '**Motion Roll hearing**'. You must fill out a form and pay a fee of £45. Both parties can then argue their case before the judge.

A Motion Roll hearing will also be convened following a welfare report, in which, for example, you would request the Court to allow contact in accordance with the report.

In some cases a Motion Roll hearing will be sufficient to conclude the case, and you will not need to progress to the Proof. This can mean ending up with an order for inadequate contact – or none at all – without you having had the opportunity to present your evidence or examine witnesses.

15.4.6. The welfare report

There is no Scottish equivalent of CAFCASS, and not even an equivalent of the old Court Welfare Service, so welfare reports are prepared by lawyers known as **curators ad litem** who are without qualifications in child development, psychology or social work. As a result the reports can be even worse than CAFCASS reports; furthermore, if you are not receiving Legal Aid, you will have to pay up to £5,000 or more, depending on the reporter's costs – e.g. how far he has to travel to interview witnesses, etc. You have no right to challenge the report or cross-examine its author. The author of this Handbook received a welfare report from a Scottish solicitor in 2003; it cost £2,000, showed a very poor grasp of the facts of the case, and was extremely damaging. It was subsequently possible to transfer the case back to the English jurisdiction and a second, marginally better, report was prepared by CAFCASS.

You can appeal a Sheriff Court decision to the Sheriff Principal from whom it will be transferred to the Inner House of the Court of Session.

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CHAPTER 16: PUBLIC LAW

I was in the throes of labour, quite dilated and about to deliver. My back was bent backwards, the head was sticking out and I was just about to push the rest of the body out. I raised my head and saw two men and two women walk into the birthing room.

Corellie Bonhomme[408]

Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent.... These are the consequences of our fallible humanity and it is not the provenance of the State to spare children all the consequences of defective parenting.

Mr Justice Hedley[409]

[408] Corellie Bonhomme describing the abduction of her daughter Fifi, quoted by Shan Ross, *Mother wins fight to get her baby back*, the Scotsman, 15 June 2006, http://news.scotsman.com/index.cfm?id=877002006

[409] Re L (Care: Threshold Criteria) (Family Division 26 October 2006)

16.1. Care

Never do anything which will cause you to register on the social services' radar.

Never go to the social services for help or support.

Never take your child to the doctor or hospital with an injury or condition which could appear 'non-accidental'.

Never go to your doctor complaining of stress or anxiety.

The social services, CAFCASS and Family Courts in this country long ago abandoned any pretence at providing support to struggling parents; they are far more likely to take your children away on the flimsiest of pretexts. They are not your friend but your enemy, and the enemy of parenting and family. You are advised to keep your head down, keep yourself to yourself and never give anyone – schools, doctors, health visitors or neighbours – any reason to doubt your competence as a parent.

Before reading this chapter you will need to read Chapters 7 and 8 on the Court and on CAFCASS. You need to know the way in which the courts are organised and how they run proceedings. You also need to be aware of the way in which CAFCASS operates.

16.1.1. What is care?

Public family law affects perhaps only a fifth of the number of children caught up in private law proceedings, but it has attracted far more publicity, and more political and journalistic support for its victims. This is partly the result of effective campaigning and partly because public law involves the state-authorised kidnap of children and the use of taxpayers' money to buy and sell other peoples' children, a trade in which there are small fortunes to be made.

The child protection system in the UK is a huge and amorphous arrangement of organisations run by central and local government. It comprises local social services departments, the Family Courts, CAFCASS, the police, the health service, an array of often self-appointed experts and a large body of legislation and rules.

Its professed function is to protect the safety and welfare of children, and to protect them from physical, sexual and emotional abuse and from neglect.

Where the perpetrator of that abuse is a parent the ultimate sanction available to the social services is to remove the child into its 'care', either temporarily or permanently. In the UK only between 0.1% and 0.3% of applications by local authorities for Care Orders are refused, and only 40% of children taken into care are returned to their parents, suggesting the rubber-stamping of orders, a failure to support parents who need help caring for their children, and perhaps even a darker purpose behind the removal of children.

The last thing you want is for your children to be taken into care. You may think it will protect them if the resident parent is a threat to them or is abusing them, but it is more likely than not that you will never see them again. Children can languish in care, or be given up for adoption, and you will lose them permanently.

16.1.2. The duty of the SS

Social services (the SS) are under a statutory obligation when making a decision regarding a child to consider the wishes of the child and his parents; **Section 22** of the Children Act 1989 stipulates that before making any decision with respect to a child a local authority shall, so far as is reasonably practicable, ascertain the wishes and feelings regarding the matter to be decided of:

a) the child;

b) his parents;

c) any person who is not a parent of his but who has Parental Responsibility for him; and

d) any other person whose wishes and feelings the authority consider to be relevant.

Social services must also provide assistance to parents which will enable them to care for their children at home rather than have them taken away. **Section 22C** of the Children Act specifies that a local authority should first attempt to ensure that a child stays with his parents, then with a person who has Parental Responsibility for him, or with a person who has a Residence Order for him. If that is not possible they are obliged to find a home for him with a relative, friend or other person who is also a local authority foster parent. Finally, if that also is not possible, they must find him accommodation in a children's home.

It is fair to say that these rules are regarded by social services with contempt: in Denmark, for example, 40% of children are placed with relatives, but in the UK the figure is a pitiful 4%.[410]

The social services must tread a fine line: they complain that they will be criticised both for failing to act and for being too interventionist ('damned if we do and damned if we don't). But criticism is healthy in a democracy; the social services far too often make the wrong decisions, and the public need to know the reasons when this happens.

Since the notorious failure of the social services to protect Baby P in 2007 another 2,000 children each year have been taken 'into care', but there seems to have been little method in this, and many of those children could safely have stayed with their parents, while cases like Baby P's will continue.

[410] Tim Loughton, Hansard, 8 October 2008, http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmhansrd/cm081008/debtext/81008-0009.htm

16.1.3. Section 37 reports

At any point in family proceedings, if he considers it necessary to protect a child's welfare, the judge may order the local authority to undertake an investigation into your child's circumstances to determine whether he should be placed under supervision or taken into care. This order is made under **Section 37** of the Children Act and so is known as a Section 37 report. The **threshold criteria** the Court must consider are explained below.

The report must be delivered within 8 weeks. As part of this investigation the local authority should consider whether it needs to offer your family 'services or assistance', whether it should apply for a **Supervision** or Care Order, or whether it should take any other action. If it decides not to it must give its reasons to the Court.

If the judge has mentioned care it may be that he's testing your commitment. Is he hinting, perhaps, that he would look favourably upon a residence application by you, because of the shortcomings of the other parent? If you do not make that application, his only options will be to leave the children with their other parent or to put them into care. If your child is taken into care and you don't have a Residence Order you will not have the right to remove him.

Alternatively if you have not had contact for some time a judge could consider an interim Care Order which would provide your children with a period apart from their other parent to allow them to recover from any alienation so that they can then be re-introduced to you without a negative attitude to contact.

Consider the case **Re M (Intractable Contact Dispute: Interim Care Order) [2003] EWHC 1024 (Fam)** in which the Court ordered a s.37 report from the local authority on the basis of which it ordered residence to be transferred to the father, a supervision order to the LA, and contact with the mother to be at the LA's discretion.

You could also make an *ex parte* application to the same judge, and ask him to express his opinion. You could explain that you did not wish your children's other parent to be pre-warned of your intention/application because you are concerned about the possibility of them absconding with or possibly harming your children.

Make certain the judge knows that if you are granted residence you will facilitate good levels of contact between your children and the contact parent, and that your children will not be so much under your control that they would agree not to visit their other parent. Few people would agree that placing them in care would be the best thing. Make that application.

16.1.4. Section 47 reports

If the Court is concerned about your child's welfare and considers that he 'is suffering, or is likely to suffer, significant harm', it can order the Local Authority to undertake a Section 47 report under **Section 47** of the Children Act 1989. This is similar to the powers available under s.37, but whereas a s.37 Report can only be ordered as part of other family proceedings and obliges the LA to consider whether they should apply for a care or supervision order, under s.47 the LA is required to make 'such enquiries as they consider necessary

to enable them to decide whether they should take any action to safeguard or promote the child's welfare'. It is thus more of a preliminary report to look into your child's welfare, whereas a s.37 Report is made when it is looking as if either care or supervision will be necessary.

The s.47 enquiry will be carried out by Children and Young People's Services either alone or jointly with the police. They may take 'reasonably practicable' steps to obtain access to your child. This includes contacting his school or doctor and interviewing him to ascertain his wishes and feelings to which it must then give due consideration when deciding what further action to take. Anyone they contact is required to assist them with their enquiry. They will wish to interview you and the other parent and assess your ability to provide for your child's needs.

If the LA complete their enquiry and decide action is necessary, or if they are refused access to your child, they can then take whatever action is in their power to take, such as an application for an emergency protection order, a child assessment order, a Care Order or a supervision order unless they are satisfied that the child's welfare can be satisfactorily safeguarded without their doing so. If they decide that no application for an order is required, they can review the case at a later date.

16.1.5. Care & supervision

Care and Supervision Orders are made under **Section 31** of the Children Act 1989 and allow a court on application by a local authority to order a child to be placed in the LA's care. The Court can also make a Supervision Order in which the child remains in his home but under the supervision of a local authority or probation (i.e. CAFCASS) officer,

The Court should not simply rubber-stamp an application by social services, though you need to be aware that only one quarter of one percent of applications are refused. The Court should only make a Care or Supervision Order if it is satisfied

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to—

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control.

This concept of 'harm' has provoked much debate and controversy; it is a term you will hear a great deal, and one you will need to understand. 'Significant' is an even more nebulous term, and its interpretation by social services or the courts is largely subjective.

We shall explain these concepts when we consider the Threshold Criteria below.

If a court makes a Care Order with respect to your child it obliges the local authority to find accommodation for him for the duration of the order. The local authority then acquires Parental Responsibility for your child and the power to limit the exercise of your Parental Responsibility, provided that it is necessary in order to protect your child's welfare. A supervision order does not confer PR.

The local authority cannot change your child's religion, cannot change his name and cannot remove him from the UK for longer than 28 days. While he is in care the local authority must allow you regular contact with your child (**Section 34**). If necessary you or your child can apply to the Court for a Contact Order; the Court should not make a Care Order until it is satisfied about the arrangements for contact. You can also apply to visit your child using **Form C15** and give your reasons. The Court can also make an order preventing you from having contact, either on application from the local authority or because the Court considers it necessary.

Moreover, the Court can make an interim order for supervision or care, where, for example, it is waiting for a report from the local authority made under Section 37 of the Children Act.

Note: that even where there is a Contact Order in place, as an emergency measure the local authority can refuse you contact in order to 'safeguard or promote' your child's welfare. This ban cannot last longer than 7 days.

Under **Section 39** of the Children Act you, your child or the local authority can apply to the Court to discharge the Supervision or Care Order. If your child is in care and you have Parental Responsibility apply to have the Care Order discharged by making an application on **Form C2**, giving brief reasons for your application. Where a Care Order is discharged the Court may put a Supervision Order in its place.

16.1.6. Threshold criteria

We have already looked in the **Introduction** at the standard of proof required by the Family Courts in the context of private law. Section 31 of the Children Act 1989 provides that the threshold is exceeded if the Court is satisfied the child is suffering, or likely to suffer, significant harm. The harm must be attributable to the care given, or likely to be given, to the child, if the order were not made, not being what it would be reasonable to expect a parent to give. Don't worry if that sounds confusing, we're about to explain it.

For the Court to be 'satisfied' the onus is on the local authority to prove their case, though only to the balance of probability standard. We believe that only the most persuasive proof should justify the intrusion of the State into a family. The problem is that such intrusion has become routine and habitual. It is probable that while the Court considers whether the threshold criteria are satisfied a variety of interim orders will be made, such as emergency protection orders and interim care orders.

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Let us define some terms. 'Harm' is defined at paragraph (9):

> *'harm' means ill-treatment or the impairment of health or development;*

And these terms are further explained:

> *'ill-treatment' includes sexual abuse and forms of ill-treatment which are not physical;*
>
> *'health' means physical or mental health; and*
>
> *'development' means physical, intellectual, emotional, social or behavioural development.*

The law does not define 'significant'; in Humberside CC v B [1993] 1 FLR 257 Booth J suggested that significant meant 'considerable, noteworthy or important'. Significant harm can also arise from the cumulative effect of several minor harms.

There are a number of separate elements involved for the threshold criteria to be satisfied:

1. The child must be suffering, or be likely to suffer in the future, significant harm. The standard of proof will be the probability standard and Re B [2008] UKHL 35; [2008] 2 FLR 141 will therefore apply (see the section on the **Balance of Probability** in the Introduction). For an interim order at an early stage of proceedings the applicant has only to show 'reasonable grounds' for believing that the Section 31(2) criteria are satisfied.
2. The harm or likelihood of harm must be shown to be attributable to the care provided by the parents not being what it would be reasonable to expect from them, or that the child is beyond parental control.

   There has been debate about whether this represents an objective standard of care or that variety of care which can only be provided by a parent or parents. The Court of Appeal had to decide on this issue in Re B and W [1999] 2 FLR 833 in which a baby had suffered serious shaking injury either at the hands of her parents or of her child-minder. The local authority (LA) made Section 31 applications to take both the parent's baby and the child-minder's 10-month-old child into care.

   At the full care hearing the first instance judge could not find whether the injury had occurred while the baby was in the care of her parents or of the child-minder. He dismissed the LA's applications on the grounds that the threshold criteria had not been met. Instead he made a Section 40 order placing both children in care pending the LA's appeal.

   The LA duly appealed and the Court of Appeal allowed the appeal relating to the baby, but the appeal relating to the child-minder's child was dismissed. The Section 31(2) threshold criteria had been reached in respect of the baby and the harm suffered was attributable to the lack of proper care; the word 'attributable' did not require the Court to find that a specified individual was responsible for the harm caused, care was often shared by a number of adults. Risk had been proved and the child should not

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be left at risk because it wasn't clear which adult had failed in their duty of care.

In the case of the child-minder's child there was no actual harm, and the threshold criterion to be considered was the risk of future harm; because it could not be proved that the child-minder had caused the baby's injuries it could not be established that her child was certainly at risk of future harm.

The parents' appeal against the care order (Lancashire CC v B [2000] 1 FKR 583) was dismissed; the Court ruled that the phrase at Section 31(2)(b)(i), 'the care given to the child', could refer to the care given by any of the care givers where care was shared.

3. The test as to whether harm is 'significant' is to compare the health and development of the child with that which could reasonably be expected of a similar child. In Re O (A Minor) (Care Proceedings: Education) [1992] 1 WR 992 Ewbank J held that a 'similar child' meant one of equivalent intellectual and social development. This raises a number of controversies, firstly whether a child raised by Muslims, Rastafarians or Hassidic Jews, etc, should be compared with a child from the same culture, or whether there are minimum standards of care which should be applied to all children regardless of culture. The latter approach was the one adopted by the Court of Appeal in Re D (Care: Threshold Criteria) [1998] Fam Law 656.

   A second controversy arises where a child has learning difficulties, or is brought up by parents with learning difficulties. In Re L (Children) (Threshold Criteria) the Court of Appeal warned against the danger of social engineering if such factors were taken into consideration.

   Note: that significant harm refers to the effect on the child rather than the intention of the parent. Cases arise – for example, where a parent goes off on holiday leaving the child behind – in which the harm caused is relatively minor but the action of the parent shows such indifference to the child's welfare that there are grounds for grave concern for the child's welfare in the future.

4. It is rare for a Care Order to be made where the child is 'beyond parental control'. In M v Birmingham City Council [1994] 2 FLR 141 a Care Order was made in respect of a 'wayward, uncontrollable, disturbed and periodically violent' teenager despite her mother's protestations. The teenager's own behaviour was evidence that she was not receiving the care necessary to protect her from significant harm. Though the teenager was living in local authority accommodation the Court ruled that 'parental control' could include any non-parent who had Parental Responsibility for the child.

   In Re O (A Minor) (Care Order: Education: Procedure) [1992] 2 FLR 7, [1992] 1 FCR 489, a case involving truancy, the Court advised that the 'similar child' must not be another child who was playing truant, but one who went to school: factors which the child has brought upon him- or herself should not be taken into account.

5. It is important, finally, to establish the date from which the threshold criteria apply; in Re M (A Minor) (Care Order: Threshold Conditions) [1994] 2 AC 424 the House of Lords held that this

date is the date of the application, or the date from which emergency measures were initiated.

16.1.7. Powers of the SS

The social services cannot simply enter your home to take your children, although under recent legislation many other agencies, including the police, can. An Emergency Protection Order (EPO) is made under **Section 44** of the Children Act 1989 if the Court is satisfied that not removing the child to local authority accommodation or not keeping him in local authority accommodation will cause significant harm to him or if enquiries being made in respect of the child under Section 47 are being unreasonably frustrated.

The application may be made without notice in exceptional circumstances.

An Emergency Protection Order gives the applicant (i.e. the Local Authority) Parental Responsibility for the child and obliges anyone in a position to do so to comply with a request to produce the child to the LA and authorises the removal of the child to accommodation provided by the applicant or the prevention of the child's removal from any hospital, or other place, in which he was being accommodated immediately before the making of the order.

The Court may add directions to the order regarding contact or medical treatment or assessment.

An Emergency Protection Order lasts up to eight days, but it can be extended once, for no more than 7 days.

The local authority must convince the Court that its Section 47 enquiries are being frustrated and that access to the child is required urgently.

Social services are taking a growing number of babies from their mothers in hospital at the moment of birth, or shortly thereafter. Such a draconian action is supposed be carried out only in the most exceptional of circumstances; but as intervention of this sort becomes more common and the precedents mount up the threshold criteria are inevitably eroded. Local authorities (and thus social services) do not have this power directly; they must call in the police who do have it under **Section 46** of the Children Act.

Where a police officer has reasonable cause to believe that a child is likely to suffer significant harm, he may remove the child to suitable accommodation and keep him there; or take such steps as are reasonable to ensure that the child's removal from any hospital, or other place, in which he is then being accommodated is prevented.

The officer must then inform the LA (which will probably have initiated the action anyway) and the child's parents or those who have Parental Responsibility for him. Once the child is under police protection the LA can apply to the Court for an Emergency Protection Order under **Section 44** of the Children Act.

If the children's services turn up at your house to remove your children they are obliged to show you authorisation, although they will

commonly claim that they do not need to; they must show you the order and your home must be specified in it. Otherwise you can legitimately refuse them entry.

The order served on you must be 'conformed' by bearing both the signature of the judge and the seal of the Court. If it does not carry these the order has not been served. You need to read it very thoroughly before admitting anyone into your home. Don't be taken in by false documents. You must also check the identification of the police and any persons claiming to be social workers or court officers, tipstaffs, etc. If you are in any doubt about the legitimacy of the order you must phone the Court using the number which is on the order. A draft of an order has no legitimacy and a copy is not a legal document; if you are shown a copy the original must be sent to you as soon as possible.

There are numerous reports that social services ignore these rules and draft their own orders which they then 'serve', so confident are they that the Court will rubber-stamp their applications. When they come to take your child they will be supported by a posse of police officers who will be prepared to use violence on you if necessary. You can probably find evidence for this on YouTube. It was rumoured that the Family Justice Review would recommend removing the requirement for a local authority to secure a court order before taking children in this way; so far they have not done so.

If you are breast-feeding your child, assuming you get the opportunity to start, you must continue to do so. An important precedent establishes your right to do this. In the matter of unborn baby **M R (on the application of X and another) v Gloucestershire County Council [2003] EWHC 850 (Admin)** the Court held,

> *If the state, in the guise of a local authority, seeks to remove a baby from his parents at a time when its case against the parents has not yet even been established, then the very least the state can do is to make generous arrangements for contact, those arrangements being driven by the needs of the family and not stunted by lack of resources. Typically, if this is what the parents want, one will be looking to contact most days of the week and for lengthy periods. Local authorities also had to be sensitive to the wishes of a mother who wants to breast-feed, and should make suitable arrangements to enable her to do so, and not merely to bottle-feed expressed breast milk. Nothing less would meet the imperative demands of the European Convention on Human Rights.*

In the well-known case of **Bury MBC v D [2009] EWHC 446 (Fam)** the judge, Mr Justice Munby, had to consider the question of whether it was lawful to remove a child at birth without informing the mother of the plan when the local authority believed that the mother – who was giving birth in prison at the time of the hearing (after assaulting her other child during supervised contact) – might harm the child if she found out the LA intended to take it for adoption.

As the child had not yet been born (technically: was still *en ventre sa mere*), proceedings could not take place under the Children Act, Munby therefore had to proceed under the inherent jurisdiction of the High Court and grant 'anticipatory declaratory relief'. He quoted the

European Court of Human Rights in Venema v The Netherlands [2003] 1 FLR 552,

> *The court accepts that when action has to be taken to protect a child in an emergency, it may not always be possible, because of the urgency of the situation, to associate in the decision-making process those having custody of the child... In particular, it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to the removal of the child from its family, was carried out prior to the implementation of a care measure.*

The justification for such interference in family life was defined by Lady Justice Hale in Re C and B (Care Order: Future Harm) [2001] 1 FLR 611 as 'the overriding necessity of the interests of the child'; in **Re B (Care: Interference with Family Life) [2003] EWCA Civ 786**, [2003] 2 FLR 813 Lord Justice Thorpe said that a judge must be 'satisfied that that is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of the children'.

He clarified in **Re H (A Child) (Interim Care Order) [2002] EWCA Civ 1932**, [2003] 1 FCR 350 that the evidence had to be sufficient to sustain the submission that separation from the parent(s) was essential to secure the child's safety.

Munby said that such powers lie 'at the very extremities of the court's powers', and quoted the local authority which claimed that 'the circumstances of the present case are so extreme, so fraught with potential danger to the physical wellbeing of the child, as to justify the Justices making such a decision', and that 'the present is such an extreme case as to justify this very draconian and, I stress, highly exceptional course of conduct'.

As we say, the more often such applications are granted, the more often they will be made. Munby does not entirely convince: these caveats would be much more persuasive if we were not well aware that the courts actually refuse only a tiny minority (0.27%) of care applications.

16.2. Keeping your Children

16.2.1. The case conference

Assuming that there is no Emergency Protection Order or other dawn raid on your family, the first step in removing your children is the Case Conference; this can be followed by an application for a Supervision or a Care Order. A Case Conference is a meeting held by social services as part of their child protection procedures. If you don't want to lose your children you *must* attend! The following people should be invited:

- The child;
- All those with Parental Responsibility for him;
- The social services case manager and possibly their line manager;
- Health services staff: health visitor, school nurse, GP;
- Education services: teacher, education welfare officer, etc;

You can take a solicitor or your McKenzie Friend with you if you wish.

There are others who may be invited if they are professionals involved with the child (mental health services, domestic violence advisor, etc) but the best practice is to keep numbers to a minimum. If a key professional cannot attend they may submit a written report.

The purpose of the Case Conference is to:

- Collate and analyse information regarding the child's health and development and the parents' capacity to protect and promote these;
- Determine the risk of the child suffering future significant harm;
- Decide on the need for registration;
- Identify a Care Manager where registration is agreed;
- Agree a child protection outline plan and its intended outcome.

Some Social Service departments try to exclude fathers, but fathers have a right to attend if they have PR, and even if they don't, research has shown that parental involvement leads to better outcomes for the child. If you have PR you have a right to know what is going on with your children. If social services call a Case Conference to which the resident parent, the school and other parties are invited, they *must* invite you as well. You should be given plenty of notice in writing of the time and location of the Conference. You should also be given in advance any reports by social workers or other evidence they propose to introduce at the Conference unless it breaches the child's confidentiality or that of a third party, or is likely to interfere with a criminal investigation.

If it is considered that your attendance will jeopardise the child, separate Conferences should be held. Exclusion should be rare, but there is a fairly flexible range of justifications for excluding you,

- Your attendance will result in intimidation and/or a physical threat to any person attending;
- There is good evidence you will disrupt the meeting;
- You become verbally abusive or threatening during the Conference;
- Attendance of one parent will prevent the attendance of the other;
- There's a legal order preventing contact with others present;
- There's a need to share confidential evidence from professionals;

- There's a need to share information about an investigation that may be prejudiced if shared with you;*
- There is a need to hear third party information;*
- The Conference needs to be given legal advice;*
- Those items above which are asterisked may only need partial exclusion of the parent/carer from the meeting.

If you are excluded you must be advised in writing and given reasons, you must then be allowed to make representation through your solicitor or McKenzie or other representative.

Like schools and doctors, social services can be reluctant to acknowledge your Parental Responsibility, and will place obstacles in your way. First they will tell you that you have no right to any information on your children they may have; then they will demand you pay for it; then they will say they don't have to provide the information for 40 days using data protection laws as an excuse. In the end you may need to go to Court to make them comply. You may even end up receiving damages from them.

16.2.2. Your rights

Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

If social services want to take your child away they must act within the law. The law, however, has shown that it merely rubber-stamps applications by SS for Care Orders: as we've said, only one quarter of one percent of applications are refused. This encourages the SS to believe they can take the law into their own hands and bypass the legal process, a fact exposed by Mr Justice Munby finding it necessary to clarify in **G (R on the application of) v Nottingham City Council [2008] EWHC 152 (Admin)**,

> *17. Local authorities and social workers have no power to remove children from their parents unless they have first obtained judicial sanction for what they are proposing to do. Only a court can make a care order. Only if a court has*

authorised that step, whether by making an emergency protection order or by making a care order or an interim care order or in some other way, can a local authority or a social worker remove a child from a parent. And the same goes, of course, for a hospital and its medical staff.

18. As I said during the course of the hearing, no baby, no child, can be removed simply "as the result of a decision taken by officials in some room."

He continued,

A social worker or a nurse is of course entitled to intervene if that is necessary to protect a baby from immediate violence at the hands of a parent. That is not, however, because they have any special power or privilege entitling them to intervene. It is merely an application of the wider principle that anyone who happens to be present is entitled, whether by restraining the assailant or by removing the defenceless victim from his assailant's reach, to intervene in order to prevent an actual or threatened criminal assault taking place before his very eyes. Hence the observation I made that "You cannot remove children, short of immediate murderous intent, except by lawful means, which means either by a police officer or Court Order." There is, of course, no need to show murderous intent. Any threat of immediate significant violence is enough, particularly if it involves a young child.

16.2.3. Your child's rights

If your child is of sufficient age and maturity to understand the nature of the case (this is referred to as **Gillick-Competence** in UK law) he has the right to take part in the proceedings and to give evidence under Article 12 of the United Nations Convention on the Rights of Children (see **Chapter 11** on the Voice of the Child).

If you can get your child to give evidence that you are a good and caring parent and that he is well cared for, this will be of enormous assistance in preventing him being taken away from you. As a result the social services and their lawyers will attempt to prevent your child from giving evidence, claiming that this will cause him 'emotional harm'.

Article 12 provides for your child's views to be given 'through a representative or an appropriate body' and this will give an opportunity for a CAFCASS guardian or the Official Solicitor to present a view diametrically opposed to that of your child and contrary to his interests. You must argue that this is an attempt to stifle your child's true feelings and prevent the Court from hearing them; it certainly contradicts the spirit of the Convention and may well breach the letter, since it denies the child 'the opportunity to be heard'.

In May 2010 the Official Solicitor contacted family lawyers to announce that his staff were unable to act as Children's Guardians in new children's cases due to the relentless rise in demand. All other options should be exhausted first and his staff be used only as a last resort. The acceptance criteria were changed to become more

restrictive and cases were only accepted once a case manager became available.

Against the (entirely hypothetical) risk of emotional harm caused by participating in proceedings the Court must balance the risk of harm caused by denying him the opportunity to be heard: by gagging him.

Read our section on the **separate representation** of children and consider particularly the Court of Appeal case of **Mabon v Mabon [2005] EWCA Civ 634**.

16.2.4. Your position statement

Please see **Section 7.2.1** on the correct format for position statements. Here are some points you should make, and which you should also repeat in Court,

- Neither I nor my partner/husband/wife has ever neglected or abused our baby/child;
- Neither I nor my partner/husband/wife has a criminal record, or have ever been charged with a serious crime;
- Neither I nor my partner/husband/wife has any problem with alcohol or with drugs;
- Neither I nor my partner/husband/wife has any learning disability;
- My child has always been happy and well looked after and has a good attendance record at school;
- My child's accommodation is appropriate and has always been kept clean and tidy;
- My child has been cruelly abused by removal from my/our loving care.

If you have been accused of unreasonable hostility towards social workers, or an inability to work with professionals, and as a consequence have been accused of suffering from a personality disorder or of being in need of anger management courses you should add the following,

- I am and have always been entirely willing to work with those professionals who are performing their statutory duty of trying to ensure that my family stays together.
- It is however quite unreasonable to expect me to cooperate with persons whose avowed intent is and always has been to take my child away and give him/her up for adoption by complete strangers.

Emphasise that your distrust of social services is not unique to you nor the consequence of paranoia or psychiatric disorder:

- Members of Parliament from all parties signed Early Day Motion 626 in 2007 deploring the taking of children by social services in order to meet adoption targets.

- More than 200 MPs of all parties signed Early Day Motion 869 in 2005 calling for an end to the secrecy of the Family Courts.

  Note: that the recent relaxation of the rules concerning who may attend Family Court cases does not yet extend to placement or adoption proceedings.

- Many highly respected journalists have published articles and run campaigns calling for the same reforms; consider Camilla Cavendish's long-running campaign in the Times which earned her the Paul Foot Award for Campaigning Journalism. Other eminent journalists such as Christopher Booker are now taking up this cause.[411]

Demand that the Court and social services take you seriously, do not accuse you of paranoia, of having a personality disorder, or of needing 'anger management courses' simply because you distrust social workers, and feel justifiably angry with a family justice system which has not only abused and split up a family it had a duty to protect and unite but has also cruelly deprived yet another child of a loving parent.

The local authority is statutorily obliged first to seek ways to keep your family together (see above). Demand that the LA recount what efforts it has made to comply with this requirement. Ask what efforts it has made to place your child with a relative. If you can show that they have failed to observe their statutory duty you will cast them from the moral high-ground.

[411] See Christopher Booker, *Is the state guilty of child kidnap?*, The Sunday Telegraph, 04 July 2009, http://www.telegraph.co.uk/comment/columnists/christopherbooker/5743419/Is-the-state-guilty-of-child-kidnap.html

Of course, you need to be careful and there is no point in being rude or unduly provocative. Just make clear that you will not kowtow to a system which has long ago lost public confidence and has done nothing to earn yours: you are your child's parent – be proud of that and don't let them take away your sense of yourself as a parent. If you let them do that, you've lost.

16.2.5. Useful advice

You will certainly need help: the Family Court is no place to venture unaccompanied. Please read our advice on solicitors and on representing yourself with the aid of a McKenzie Friend in **Chapter 4**. You will also need to familiarise yourself with the rules on **disclosure**; you have every right to get the help you need, and you can even 'go public' (as things stand currently and with restrictions) once the case has concluded. We would also implore you to read **our warning** about whom you should not go to for advice.

Social services are constantly on the look-out for children to be taken into care or be adopted. These are some basic rules to ensure that your child does not become one of the statistics,

- Never do anything which will cause you to appear on the social services' radar. Never contact them for help or advice. If you report your partner to the social services (SS) because he or she is abusing your children the chances are they will try to take your children into care to protect them from risk.

- Never trust the SS: once they have applied for a Care Order their sole aim is to get your children away from you; they have no interest in your children's welfare.

- However badly the SS treat you, ignore it. All that matters is the welfare of your children, not your own. Never mention any consequence to you of SS behaviour: it will be used as evidence against you. Always emphasise that you are working in the best interests of your children to ensure that they can be reunited with their family. Shame the SS into acknowledging that this should be their objective also, and that you cannot work cooperatively with someone who has already prejudged the case by declaring to the Court that they want to take your children into care or have them adopted.

- Never believe anything the SS tell you, and always ensure that everything they do tell you is confirmed in writing.

- Never sign any document they give you. They have no powers to force you to do anything; only a judge can do that. If you are asked to sign a document you are not happy with, return to the Court to contest it.

- Never take the advice of the SS, for example if they tell you your only hope of seeing your children again is to separate from your partner. This 'divide and rule' tactic is designed to lose you vital support and to demoralise you; you will then lose your partner, your case and your children.

- Never let the SS wind you up or get you angry – always be polite and respectful.

- As far as possible refuse to be assessed by 'experts' such as psychologists, psychiatrists, doctors, counsellors, etc. The purpose of such assessment carried out on behalf of the SS is to gather evidence which can be used against you.

- Advise your doctor that you want your medical records kept confidential if the SS request to see them, and that there are legal proceedings on-going. Ensure that your records can only be seen if the Court orders it.

- If you are assessed remain calm and polite. Answer questions as briefly as possible: don't waffle or give them anything which can be used as evidence to take your children away.

- Don't make any complaint against the SS: it will just be used as evidence against you.

- The SS cannot enter your home without a Recovery Order from the Court, nor can the police without a warrant. Put a chain on your door so that if broken it proves a 'forced entry' which is a criminal offence.

- If you are granted contact with a child in care, ensure the contact times are convenient for you and are not arranged for inconvenient times such as when you are working. If you lose your job you are less likely to be reunited with your child. Don't leave Court without these times written into your order.

- Represent yourself in Court. The first duty of a solicitor or barrister is to the Court and not to you: they are part of the system and won't do anything which threatens their relationship with it.

  Note: that this does **not** mean they are corrupt or out to steal your children – they just won't risk their careers for you.

- Never give the social services any indication of your legal strategy; you don't want to alert them so that they can use it to defeat you in Court.

- **Most importantly: never let your children think you don't love them anymore; resist as far as you can any attempt by the SS to brainwash or alienate your children. They will often tell your children you are too ill to care for them any longer or that you don't love them. At any and every opportunity you get, tell them you *do* love them. Tell them that you will do *everything* you can to get them back. Tell them that no matter what happens, one day you will be reunited again.**

  Tell them that the social workers are evil child-stealers and kidnappers who want to take them away from you. While this may seem brutal it is essential that your children are given the truth, and that you do all you can to prevent them settling in with a new family if you are to stand any chance of getting them back again, and to ensure that eventually they will vote with their feet.

16.2.6. Appeals

The appeals procedure is described at **Section 9.3**.

Appeals can only be launched with the proper documentation, and one of the common problems encountered in public law is that the courts do not always provide litigants with copies of their Court Orders.[412]

You have the right to a copy of your judgement; do not leave Court without it. Please read the section on **accessing your court files**.

When appealing the same principles apply as in private law: the judge must have either,

- misdirected himself in law;
- failed to take account of a relevant factor;
- taken into account an irrelevant factor; or
- made a decision which is 'plainly wrong'.

It is not enough merely to disagree with the decision. You need to read the judgement very closely (this is why you must have a copy of it) in order to pursue your case on one (or more) of these points.

[412] See Ben Leapman, *courts won't reveal rulings in adoption cases*, the Sunday Telegraph, 08 August 2007, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/08/05/nadopt105.xml

If you cannot find that the judge has erred in one of these ways, you can apply to have the order discharged on the grounds that your circumstances have changed for the better. This is an easier process to commence than an appeal. Under Section 34(9),

> *The court may vary or discharge any order made under this section on the application of the authority, the child concerned or the person named in the order.*

Care applications rarely get to appeal. One case which did had been judged in the lower court by Judge James Orrell in a hearing lasting only 15 minutes; three children were taken into care on the grounds that a bruise on the ear of one of them could have been caused non-accidentally.

In the Court of Appeal in February 2011 Lord Justice Thorpe said,

> *I am completely aghast at this case. There is nothing more serious than a removal hearing, because the parents are so prejudiced in proceedings thereafter. Once you have lost a child, it is very difficult to get a child back… There is a point where a judge's brisk conduct of business in his search for protection of a child is just not acceptable. This does not seem to me like acceptable process or natural justice.*

The only criterion for the discharge of a Care Order or the variation or discharge of a Supervision Order is the welfare of the child concerned. The burden of proving that it is in the child's best interests for the order to be discharged or varied is upon the person applying for the order. See Re B (Minors) (Contact) [1994] 2 FLR 1 and Re S and P (Discharge of Care Order) [1995] 2 FLR 782. You should note, however, that the *Family Bench Book* warns judges 'to guard against a discharge application being used as a back door appeal against the original order'.

Once you have exhausted the appeal process in the UK courts you can make an appeal in the European Court of Human Rights in Strasbourg, though this is a very laborious and time-consuming process. If neither you nor your partner have harmed your child and don't have a criminal record you have a very good chance of winning.

16.2.7. Making a complaint

Because social workers investigate themselves, making official complaints about them can be a waste of time. Any complaints you do make are likely to be used against you, and your unwillingness to work with social workers can be used as the basis of an allegation of paranoia or other mental instability. Tread very carefully.

You are advised not to make criticisms of individuals and to concentrate your complaint on any abuse of the system and failure to observe correct process.

Complaints are handled at a local level, and you will need to contact the Complaints Team for Children's Services at your local authority. They will expect you to approach the member of staff about whom you are complaining first, or their manager. You will probably find you can only make a complaint if you have Parental Responsibility for the child concerned.

A complaint must be made within 12 months of the incident about which you are complaining, and you must state clearly what you want the complaints team to do about it. Your LA should be able to provide you with a form on which you can set out your complaint.

The Labour Government produced a document, *Getting the Best from Complaints*, which will give you further help and advice. It is no longer current, but you can download it **here**.

16.2.8. Avoiding care

The media are full of reports of pregnant mothers whose babies are taken away from them as soon as they are born. If you are pregnant and the SS are threatening to take away your baby, your best option is to flee to a European country likely to be sympathetic to your predicament – such as Sweden – and where you will be able to claim benefits (Ireland will not pay benefits).

If no Court Order has been made the social services cannot prevent you leaving the country. Even where a court order has been made – often in your absence while you were abroad – the ensuing publicity attending the attempts of the SS to force your return can work to make you the winner.

This really is very often your only chance of keeping your children, and we strongly encourage you to take this advice seriously. Of course moving abroad can be hugely disruptive and expensive, but in all probability you won't have a choice. In June 2009 the MP John Hemming encouraged a couple to move to Ireland in order to keep their child.[413] An allegation had been made that their oldest child had been sexually abused, despite the lack of evidence against them, she was taken into care and adopted; the same thing happened to their second daughter.

Hemming advised them that their only hope of keeping their soon-to-be-born third child was to flee the country. They sold everything they had, bundled clothes into black bin liners and took the ferry from Fishguard to Rosslare. Sadly, within 24 hours of the child being born in County Wexford General Hospital, she was taken into care, though Hemming says the couple stand a better chance of winning her back in the Irish courts.

The father, a former serviceman, said,

> *I am very angry. I fought for my country but now I have been forced to leave it. We are not baby factories for these people just so they can get their quotas up.*
>
> *Under family law in England, you are guilty until proven innocent – and you can never prove your innocence.*

As a result of the incorporation of the Schengen Agreement into European law, there are no longer frontier controls at the borders between 22 European countries. Full signatories to this agreement are Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland,

[413] Andrew Alderson, *British baby seized in Ireland after parents flee social workers over custody row*, Sunday Telegraph, 06 June 2009, http://www.telegraph.co.uk/news/worldnews/europe/ireland/5459740/British-baby-siezed-in-Ireland-after-parents-flee-social-workers-over-custody-row.html

France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden; Iceland, Norway and Switzerland are also signatories although they are not EU members. The UK and Ireland are only partial signatories.

If you have a passport you can move freely between these countries and stay for up to 3 months.

16.2.9. Contact with children in care

Children in care have the right to visit you in the afternoons, to make telephone calls to you and to email you. You can apply to the Court to have contact using **Form A53**. Note, however, that if you 'induce, assist or incite' your child to run away, or if you prevent your child from returning to the care home, you will be guilty of an offence under **Section 49** of the Children Act.

Social services are obliged first to arrange the return of your child by agreement; if they do not believe your child is in any immediate danger they must notify you in writing of the actions they can take if you refuse to comply. If, however, they believe that your child is at risk by visiting you they can apply to the Court for an Emergency Recovery Order under **Section 50**(8) of the Children Act without informing you and the police will come and take your child back. They have no power, however, to prevent your child visiting you the next day, and after a few recoveries will probably give up.

Social services must demonstrate to the Court that your child has been taken away or is being kept away, has run away or is staying away.

The Recovery Order obliges you to hand over your child, and empowers the social services to remove him from your home. It authorises the police to enter your home and to search it, using 'reasonable force if necessary'. Your home must be identified in the order and there must be reasonable grounds to believe that your child is there. A Recovery Order made in England or Wales has effect in Scotland.

16.3. Excuses for Care

Social services use numerous excuses to take children away from their parents. Some are feeble, and claiming 'a risk of emotional harm' is normally nothing more than an attempt to meet adoption targets. Many accusations are easy to deal with: if social services say your house is dirty or untidy emphasise their statutory obligation to help you with that before taking your child into care; if they say your child's school attendance is poor, say that the school should have sent you a letter of warning to that effect.

The simplest test social services will apply is to ask if the child is at risk of harm from the carers. They will also ask if the child's injuries or illness are consistent with the explanation given by the carers. If the explanations are vague or inadequate to account for the child's condition the child will be taken away.

You must *always* challenge these decisions: cases taken to the European Court of Human Rights have demonstrated that the UK courts make decisions which are 'draconian' and unjustified. In P, C and S v United Kingdom (2002) 35 EHRR 31, [2002] 2 FLR 631 the Court overturned a decision made by Lord Justice Wall.[414]

P, an American, had had a child by a previous partner taken into protective custody in the US. She met and married C and they had a daughter, S, who was taken into care under an Emergency Protection Order. Wall upheld the decision on appeal on the grounds that P had a personality disorder.

The couple's case was threefold:

- Their rights under Article 6(1) (right to a fair trial) had been abused: they had not been involved in the decision making process and had not been given access to representation to challenge the Freeing Order;
- Their rights under Article 8 (right to family life) had been abused: adoption was irreversible and made no provision for resuming any form of contact in the future; and
- Their rights under Article 12 (right to found a family) had been abused.

The complaints under Articles 6 and 8 were upheld; the complaint under Article 12 was not an issue separate from Article 8. Given the complexity and importance of the case it was essential that P should have legal assistance. Removal of a child from its mother at birth required exceptional justification which was not provided in this case,

> *The court concludes that the draconian step of removing S from her mother shortly after birth was not supported by relevant and sufficient reasons and that it cannot be regarded as having been necessary in a democratic society for the purpose of safeguarding S. There has therefore been, in that respect, a breach of the applicant parents' rights under Article 8 of the Convention.*

Use this important precedent and the others here in your own case; know your human rights. Below are some of the more dangerous allegations the SS are likely to make against you and the objections to them.

16.3.1. Shaken baby syndrome

Social services are on very uncertain ground if they accuse you of Shaken Baby Syndrome. This is a diagnosis made only of very, very ill babies, or made post mortem. Beware of anything which calls itself a syndrome, this simply means a diagnosis which cannot be made on one clear piece of evidence and which must therefore depend on demonstrating the presence of two or more from an often disputed list of symptoms, any one of which can be indicative of something else when taken in isolation.

[414] http://www.nkmr.org/english/p_c_and_s_v_united_kingdom_verdict.htm

A conventional diagnosis of Shaken Baby Syndrome usually depends on the identification in the child of all of the following three symptoms:

- Retinal haemorrhage – small bleeds (petechiae) in the back of the eye;
- Subdural haemorrhage – bleeding between the brain and the membrane attached to the skull caused by rupture of a vein lying on the surface of the brain;
- Encephalopathy – injury to the brain diagnosed by swelling.

A review ordered by the Attorney General concluded that, even where this 'triad' was present, Shaken Baby Syndrome could not be diagnosed with confidence unless there was a previous history of injury such as severe bruising, broken bones or abuse. Medical staff should also look for other indicators such as neck injuries and bruising caused by gripping. Shaking a child sufficiently to make its brain impact with the inside of its skull should cause significant external bruising.

Experts are not agreed on Shaken Baby Syndrome: in the notorious Louise Woodward case in the US experts appeared for both sides and gave entirely conflicting testimony; even the 8 physicians for the prosecution could not agree. Three UK pathologists who dissented from the prevailing orthodoxy – resulting in the acquittal of accused parents – claimed the Metropolitan Police were conducting a smear campaign against them.[415] Here are some of the controversies concerning Shaken Baby Syndrome,

1. *It is assumed that shaking alone, of an otherwise healthy child, causes retinal haemorrhages and subdural haematomas.*

   Biomechanical research does not support this theory, the mechanism is uncertain and does not seem to be related to mechanical trauma; more likely causes are a sudden increase in intra-cranial pressure, venous pressure or lack of oxygen. Many experts believe that an impact (on a wall or the floor) is also necessary to cause death; an impact produces a much greater force (50 to 100 times) than can be produced by shaking alone, and the forces attributable to shaking are not often enough to account for the injuries suffered.

2. *It is assumed that short distance falls cannot kill infants or children (and that therefore there must have been deliberate injury).*

   Medical research and case studies indicate that some children (and even some adults) can and do die from short falls.

3. *It is assumed that pre-existing subdural haematomas do not re-bleed spontaneously or as a result of lesser trauma or no trauma at all.*

[415] Kiran Randhawa, '*Shaken baby' experts accuse Scotland Yard of threats*, London Evening Standard, 08February 2011, http://www.thisislondon.co.uk/standard/article-23921405-shaken-baby-experts-accuse-scotland-yard-of-threats.do

It is undisputed in adult literature that subdural haematomas can re-bleed while healing, and there is no reason to think that children's brains would behave differently.

4. *It is assumed that a child suffering from an ultimately fatal head injury cannot experience a lucid interval between the inception of the subdural and his or her respiratory arrest.*

   It is undisputed that adults can experience lucid intervals after an intracranial haemorrhage (consider the tragic case of Natasha Richardson) and there is no data to support a belief that children's brains are different. Medical literature and case studies have documented numerous instances of lucid intervals in fatal childhood head injury cases.

5. *It is assumed that retinal haemorrhages only occur in cases of Shaken Baby Syndrome or non-accidental trauma.*

   Retinal haemorrhage is found in many different scenarios including birth trauma which is present in about a third of babies but which clears up within 6 weeks, certain diseases and other accidental or non-accidental eye injuries. It cannot be pathologically interpreted or dated with any accuracy.

   Both retinal haemorrhaging and subdural haemorrhaging can be caused by swelling in the brain and a lack of oxygen, as a result of a variety of causes, leading to the death of the infant. These symptoms have been found in infants who have never left hospital since birth, and who could never have been the victims of shaking.

6. *It is assumed that factors such as an old subdural, thrombotic disorder, or a tendency to bruise easily are indicators of prior abuse.*

   These symptoms may well be indicators of other systemic problems; parental guilt is presumed on the basis of improbability rather than proof beyond reasonable doubt.

16.3.2. Failure to thrive

Failure to thrive means that a child – usually an infant – is not putting weight on as expected. There can be a variety of reasons for this:

- Malnutrition – this is not always an indication of neglect, it may be the parents don't know how to feed their child and need advice and support, or they are worried their child will become obese;
- Poverty – again the parents will need help, perhaps with budgeting or with learning to prepare cheap but nutritious meals;
- Hitherto undiagnosed diseases of the gastrointestinal system such as gastro-oesophageal reflux disease (GERD), chronic diarrhoea, cystic fibrosis, chronic liver disease, and celiac disease;
- Other chronic illness or medical disorder such as cleft lip, or cardiac, endocrinologic, and respiratory disorders;
- Lactose intolerance;

- Infections or parasites;
- Metabolic disorders.

Children who fail to thrive need the help of their parents, their doctor, and other experts such as a nutritionist. Predictably where failure to thrive is thought to be the fault of the parents a social worker will be brought in, and this can lead to care proceedings.

The crucial test is whether the child thrives once he is taken away from his parent(s), if he does not, then clearly the fault was not theirs. Your own GP is the best person to give evidence on whether you have done all you should have done.

16.3.3. MSbP

Münchausen's Syndrome is a psychiatric disorder in which a person feigns illness or injury in order to win sympathy or attention. Münchausen's Syndrome by Proxy (MSbP) is presented as a psychiatric disorder in which one person – usually a parent – gradually and insidiously inflicts injury or illness on another – usually a child. There is some confusion amongst users of the term over whether the syndrome applies to the parent or to the child.

MSbP was first described in 1977 by the Professor of Paediatrics at Leeds University, Roy Meadow. The diagnosis was used in a number of high profile trials, in which Meadow appeared as an expert witness, including those of Sally Clark, Trupti Patel and Angela Cannings, all of whom proved to be innocent, contrary to Meadow's evidence. The theory was also taken up by Dr David Southall. Both Southall and Meadow were subsequently discredited and disgraced; Meadow's wife described him as a misogynist who saw MSbP everywhere; coincidentally he had played the witch-finder Judge Danforth in an amateur production of Arthur Miller's 1953 play *The Crucible.*

While there is no doubt that some parents do indeed harm their children, MSbP is a controversial diagnosis, not least because perpetrators are mostly (over 90%) mothers. It is easy to dismiss it as the ravings of a discredited misogynist; as with Parental Alienation Syndrome, however, the defrocking of its promoters does not necessarily invalidate it as a diagnosis. If you are a mother do not rely on the fact that Meadow and Southall were disgraced as an argument in Court. An allegation must prove not only the psychiatric condition but also the fact of harm, and inducing illness or injury in a child may well be down to other causes, such as trying to disguise abuse.

MSbP is diagnosed using a number of the following indicators; note that many of these could also be indicators of genuine but undiagnosed illness:

- The child has one or more medical problems which do not respond to treatment and which follow an unusual, unexplained or perplexing course.
- Laboratory findings are unusual, inconsistent with the known history, or clinically impossible.
- The parent may work in health care, but in an unqualified role, for example as an orderly or porter.

- The parent is medically knowledgeable and/or fascinated with medical details and hospital gossip, appears to enjoy the hospital environment, and expresses interest in the details of other patients' problems.

- The parent is reluctant to leave their child's side and seems to require constant attention.

- The parent is unusually calm in the face of serious difficulties in their child's medical treatment while being highly supportive and encouraging of the physician.

- The parent is angry, devalues staff, and demands further intervention, more procedures, second opinions, and transfers to other, more sophisticated, facilities.

- The signs and symptoms of the child's illness do not occur in the parent's absence.

- There is a family history of similar or unexplained illness or death in a sibling.

- The parent has symptoms similar to the child's or an unusual and perplexing medical history.

- There is an uneasy relationship between the parents; the other parent often fails to visit the child and has little contact with physicians even when the child is hospitalised.

- The parent reports dramatic events, such as house fires, burglaries, or car accidents, while their child is undergoing treatment.

- The parent has an insatiable need for adulation or makes self-serving efforts for public acknowledgment of their abilities.

Münchausen's (or Münchausen) Syndrome by Proxy (MSbP) is an attempt to provide a hypothetical explanation of why a parent harms their child. It is purely speculative, at best. The harm must still be proved, and you must be proved to be the perpetrator if social services are to take away your child. A doctor is only qualified to describe the harm caused, and it is beyond his competence to attempt to identify a motive. A social worker is not qualified to diagnose the harm done, and is certainly not qualified to make a diagnosis of MSbP, though many will try to. So who can diagnose MSbP? Or, if it is considered a hypothesis rather than a diagnosis, who can not? Is it really then a syndrome, or merely a suspicion?

Any matter brought before a court of law must be determined simply by the facts, not by supposition and speculation. No court of law should make a diagnosis of MSbP (or its siblings) until the many disagreements and confusions surrounding it are resolved.

There is, first of all, no clear definition of MSbP: in Roy Meadow's original definition the mother's intent and her denial are taken as indications; a later definition – referred to as Factitious Disorder by Proxy (FDBP) – considers the induction of symptoms as indicative. A third disorder – Paediatric Condition Falsification – was added in 2000.

Secondly, it isn't clear whether MSbP is a diagnosis of the parent or of the child. In Meadow's original definition it was the child who suffered – as in PAS; in later definitions it is the parent. It should be remembered that Meadow has now been discredited for giving evidence in areas in which he had no competence.

Note: the difference from PAS. In MSbP diagnosis is made on the basis of symptoms which could well have an alternative innocent explanation: the child could genuinely be ill and the mother genuinely concerned. In PAS, on the other hand, the child's symptoms are an indication that one or other parent is undoubtedly guilty of abuse; the Court's task is to determine which one.

MSbP is not defined as a mental disorder; the evidence of a psychiatrist should not therefore be admissible to the Court. It is a behaviour describing a type of child abuse, but it isn't a medical diagnosis either of the parent or of the child.

A medical practitioner therefore cannot state that a person 'suffers' from MSbP and any evidence submitted to that effect should also therefore be inadmissible. The evidence of a medical practitioner must be confined to what he has observed and heard, and to any forensic evidence found by recognised medical investigative procedures.

The problem for prosecutors is that frequently it is difficult to prove that a parent – usually a mother – has indeed harmed her child, since she will characteristically (according to the diagnosis criteria) have medical training or knowledge and show concern for the well-being of her child. Typically, the child's symptoms will abate once in the care of medical professionals, and this is taken as evidence that the mother was causing the symptoms: now that the child is away from her malign influence she can no longer cause him harm. But if one stops to think, it is clear that a child with an illness which is genuine will also improve once in the care of the medics: it is, after all, their job to cure him.

Indisputable evidence, such as witnessing (or recording on CCTV) a mother harming her child or administering poison, is rare. The effect of this is that the diagnosis – or allegation – of MSbP is really just a substitute for evidence; by arguing that the mother's behaviours – medical knowledge, concern for her child, demand for medical intervention, etc – are all symptomatic of the syndrome, prosecutors can effectively bypass the absence of authentic evidence and assist the State in removing the child from his mother.

If the mother denies the allegation, that is also taken as a symptom of her MSbP and an indication of guilt; if she confesses that counts as direct evidence. Either way she is caught in a Catch 22 situation and her children are likely to be taken. This can lead to appalling injustice, and a child with unusual and perplexing symptoms who remains undiagnosed and untreated.

If the prosecutors can further argue that returning a child to a MSbP mother puts him at significant risk of harm and even infanticide the courts will always be happy to cooperate and sign the care orders.

This is not to argue that child abuse is not a grave problem to be taken seriously by social workers and the courts, but an allegation of MSbP is not in itself evidence, it is simply a short-cut for the incompetent and the idle, and risks exposing the child to much greater

harm by being put into care. Applying the MSbP label to a woman is prejudicial: it judges her guilty without analysing the evidence against her or even troubling to find any evidence.

A truly horrific case was reported in October 2009.[416] Lisa Hayden-Johnson claimed her son was the 'sickest child in Britain' with cerebral palsy, cystic fibrosis, the throat disorder dysphagia and an allergy to all types of food. She also doctored his urine samples to make it appear he had diabetes. She kept him confined to a wheelchair and doctors fitted him with a permanent feeding tube so that he could be fed through a food pump. Over a period of six-and-a-half years the child spent at least six weeks of each year in hospital and endured 9 unnecessary general anaesthetics.

The mother fooled professionals and the boy's estranged father (evidence of the risk to children when fathers are removed); a charity singled him out for praise and he was introduced to the Duchess of Cornwall and given free tickets to *The X Factor* television show. The mother received £130,000 in benefits and a Motability car; her fraud was only discovered after she made a false allegation of rape, which she made more plausible by rubbing bleach into her self-inflicted wounds.

Clearly a diagnosis of Münchausen's and Münchausen's by Proxy would be tempting but superfluous, and the woman was charged with intending to pervert the course of justice and with cruelty on a person under the age of 16. In January 2010 she was sentenced to a jail term of three years and three months.[417] The child now lives with his father and sister.

On 18 January 2005 Mr Justice Ryder adopted into English law a ruling made in Queensland, Australia in the High Court case **A County Council v A Mother and A Father and X,Y,Z children [2005] EWHC 31 (Fam)**. In his final conclusions regarding Factitious Disorder, Ryder states,

> *174. I have considered and respectfully adopt the dicta of the Supreme Court of Queensland in R v LM [2004] QCA 192 at paragraph 62 and 66. I take full account of the criminal law and foreign jurisdictional contexts of that decision but I am persuaded by the following argument upon its face that it is valid to the English law of evidence as applied to children proceedings.*
>
> *175. The terms 'Münchausen syndrome by proxy' and 'factitious (and induced) illness (by proxy)' are child protection labels that are merely descriptions of a range of behaviours, not a paediatric, psychiatric or psychological disease that is identifiable. The terms do not relate to an organised or universally recognised body of knowledge or experience that has identified a medical disease (i.e. an illness or condition) and there are no internationally accepted medical criteria for the use of either label.*

[416] Simon de Bruxelles, *Mother faces jail for faking son's illness and claiming benefits*, the Times, 17 October 2009, http://www.timesonline.co.uk/tol/news/uk/crime/article6878582.ece

[417] *Mother who met royalty and celebrities after pretending son was ill jailed*, Daily Telegraph, 22 January 2010, http://www.telegraph.co.uk/news/uknews/crime/7053754/Mother-who-met-royalty-and-celebrities-after-pretending-son-was-ill-jailed.html

176. In reality, the use of the label is intended to connote that in the individual case there are materials susceptible of analysis by paediatricians and of findings of fact by a court concerning fabrication, exaggeration, minimisation or omission in the reporting of symptoms and evidence of harm by act, omission or suggestion (induction). Where such facts exist the context and assessments can provide an insight into the degree of risk that a child may face and the Court is likely to be assisted as to that aspect by psychiatric and/or psychological expert evidence.

177. All of the above ought to be self evident and has in any event been the established teaching of leading paediatricians, psychiatrists and psychologists for some while. That is not to minimise the nature and extent of professional debate about this issue which remains significant, nor to minimise the extreme nature of the risk that is identified in a small number of cases.

178. In these circumstances, evidence as to the existence of MSBP or FII in any individual case is as likely to be evidence of mere propensity which would be inadmissible at the fact finding stage (see Re CB and JB supra). For my part, I would consign the label MSBP to the history books and however useful FII may apparently be to the child protection practitioner I would caution against its use other than as a factual description of a series of incidents or behaviours that should then be accurately set out (and even then only in the hands of the paediatrician or psychiatrist/psychologist). I cannot emphasis too strongly that my conclusion cannot be used as a reason to re-open the many cases where facts have been found against a carer and the label MSBP or FII has been attached to that carer's behaviour. What I seek to caution against is the use of the label as a substitute for factual analysis and risk assessment.

16.3.4. Smacking

The law states, 'Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment' (Children Act 2004, **Section 58**). In practice 'reasonable' punishment or chastisement is permissible provided that it doesn't leave a mark, and doesn't involve an implement, such as a belt or cane.

You can be charged under Sections 18 and 20 of the **Offences against the Person Act 1861** if you wound or cause grievous bodily harm to your child, or under section 47 of that Act if you assault or occasion actual bodily harm to him. Under **Section 1** of the Children and Young Persons Act 1933 you can also be charged with cruelty to a person under 16.

As a rough guide, *actual* bodily harm usual involves an injury which will require some degree of medical attention; *grievous* bodily harm involves an injury leading to permanent physical or psychological damage or scarring.

Someone is guilty of cruelty to a child if he 'wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him

to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement)'. The exact nature of the charge will depend on the harm caused the child; injuries which would be regarded as common assault when inflicted on an adult can be regarded as actual bodily harm when inflicted on a child.
In **Re MA (Care: Threshold) [2009] EWCA Civ 853** Lady Justice Hallett said,

> *Reasonable physical chastisement of children by parents is not yet unlawful in this country.*
>
> *Slaps and even kicks vary enormously in their seriousness. A kick sounds particularly unpleasant, yet many a parent may have nudged their child's nappied bottom with their foot in gentle play without committing an assault.*
>
> *Many a parent will have slapped a child on the hand to make the point that running out into a busy road is a dangerous thing to do. What M alleged therefore was not necessarily indicative of abuse. It will all depend on circumstances.*

Additionally it is important to distinguish between the bruises, bumps and scratches which are a normal and essential part of the rough and tumble of childhood and the more severe bruises, broken bones and cigarette burns which are an indication of abuse, and are often accompanied by malnutrition and neglect. Parents who authentically abuse their children very rarely go to Court to petition their return.

There are those, however, and some of them are social workers, who believe that even reasonable chastisement should be banned, and you may find yourself at the mercy of these zealots, particularly if you smack your child in public. If you are having any difficulties with the social services you need to remain whiter than white, which isn't easy, given the pressure you will be under.

16.3.5. Future harm

The law allows for care orders to be made where 'the child concerned is suffering, or is likely to suffer, significant harm'. That means that a child can be taken into care when no harm has befallen him, but where it is considered possible that at some unspecified future date it may.

The claims by social workers and expert witnesses that they are able to predict the future, even before a child is born, should be given no more credibility than the prophecies of a fairground fortune-teller that you will meet a tall, dark, handsome stranger. You are entitled to embarrass them in Court and insist that they stick to the facts.

Every case where a baby is snatched at birth relies on this prediction of future behaviour; if you have already abused your older children then such a prediction can reasonably be justified, but all too often there is no evidence whatsoever on which to base these prejudices, and you must therefore demonstrate that in the courts, using precedents like P, C and S above.

There are high profile cases, such as the aforementioned trial of Louise Woodward in the US, where expert witnesses have given diametrically opposed evidence, showing the fallibility and lack of consensus in this area: you can find an expert witness who will testify to almost anything. Many expert witnesses, including Professor Sir Roy Meadow, Professor David Southall and Dr Marietta Higgs have subsequently been discredited and humiliated.

Consider the following tragic case. In **Re W (A Child) [2009] EWCA Civ 538** a girl, A, was taken away from a mother because her new husband had been a possible perpetrator of a very severe head injury against his son by a previous marriage, notwithstanding the facts that the son continued to live with his parents and the father continued to have contact after separation. Subsequent evidence cast doubt on the injury being non-accidental. The mother's application for residence and a stay of the adoption order were refused.

The case shows how a decision based on the balance of probability – the original judge chose the evidence of one expert witness over that of another – can go on to be accepted as a certainty ('where no certainty exists') resulting in a child to whom no harm has been done losing a mother who has never been accused (let alone convicted) of wrongdoing. As the appellate judge, Lord Justice Wilson, observed of the case,

> *Among its most haunting features is surely the fact that A's mother, who sits before me today, has, subject to this proposed appeal, lost her child by reference to circumstances which, largely, do not relate to her.*

16.3.6. Emotional abuse

The Department of Health defines emotional abuse thus:

> *Emotional abuse is the persistent emotional ill-treatment of a child such as to cause severe and persistent adverse effects on the child's emotional development. It may involve conveying to children that they are worthless or unloved, inadequate, or valued only insofar as they meet the needs of another person. It may feature age or developmentally inappropriate expectations being imposed on children. It may involve causing children frequently to feel frightened or in danger, or the exploitation or corruption of children. Some level of emotional abuse is involved in all types of ill treatment of a child, though it may occur alone. (Department of Health et al, 1999, p.5-6)*

If social services accuse you of emotionally abusing your child, use this definition. Emotional abuse must be persistent or frequent; isolated incidents do not satisfy the definition, nor does behaviour which does not cause 'severe and persistent effects on the child's emotional development'.

If they cannot demonstrate that you have abused your child according to this definition their allegation won't stand up in court. Most such allegations are far too vague to be substantiated. State in your position statement and in your evidence to the Court that there is no evidence to show your child has ever suffered or been at risk of suffering emotional abuse as defined by the Department of Health.

16.4. Adoption

16.4.1. Open, closed & forced

Adoption is the transfer of all legal rights over a child from its natural parents to the adoptive parent(s). An adoption order under **Section 12** of the Adoption Act 1976 transfers Parental Responsibility for a child to the adoptive parent(s) and 'extinguishes' the natural parents' Parental Responsibility.

In many countries there is a policy of 'open' adoption in which the birth parents retain a degree of contact with their children; only in the UK and some states of the US is there the complete severance of 'closed' adoption.

'Forced adoption' is the forced removal by a local authority of a child from its parents so that it can be fast-tracked for adoption. According to journalist Christopher Booker it is 'one of the worst hidden scandals in Britain today',[418]

> *It is clear that the child protection system created under the Children's Act 1989 has gone horrifyingly off the rails, leading one High Court judge recently to compare it to the kind of thing which went on in 'Stalin's Russia or Mao's China'.*[419]

[418] Christopher Booker, *Britain's forced adoptions: the hidden scandal we can't ignore*, Sunday Telegraph, 07 August 2010, http://www.telegraph.co.uk/news/uknews/law-and-order/7931828/Britains-forced-adoptions-the-hidden-scandal-we-cant-ignore.html

[419] Lord Justice Aikens describing Devon social workers in April 2010

If you are a victim of this vile trade we urge you to read our account of forced adoption in our document *Family Justice on Trial.*

16.4.2. Mental capacity

The story of Rachel Pullen, whose child was taken from her because she was deemed too stupid to care for her, is told in *Family Justice on Trial.* It raises an important issue. The law provided by **Section 52** of the Adoption and Children Act 2002 states,

> *(1) The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the Court is satisfied that—*
>
> *a) the parent or guardian cannot be found or is incapable of giving consent, or*
>
> *b) the welfare of the child requires the consent to be dispensed with.*

If it is considered that you are 'incapable of giving consent' because you lack the mental capacity to represent yourself or manage your own affairs and no other person or agency is able to act for you the Official Solicitor can be invited to do so. The Official Solicitor is appointed by the Lord Chancellor under **Section 90** of the Senior Court Act 1981, and is thus an employee of the state who will not be concerned to put your interest before that of the social services; he is merely a part of the system. Your own solicitor, whatever his

integrity or however much you trust him will not then be able to continue with the case.

It is a matter for the Official Solicitor's discretion whether he consents to act and he cannot be compelled to act. Due to the relentless rise in demand the Official Solicitor is only getting involved in cases where absolutely necessary – explore all other options first. If he consents to act, he may become involved in proceedings as a 'litigation friend' – that is, someone who conducts proceedings and has no interest in them. Guidance on the role of a litigation friend is provided in the **Practice Direction**. **Rule 21.2(1)** of the Civil Procedure Rules provides that,

> *A protected party must have a litigation friend to conduct proceedings on his behalf.*

Rule 21.1 defines a 'protected party' as 'a party, or an intended party, who lacks capacity to conduct the proceedings'. Lacking capacity is defined by reference to the **Mental Capacity Act 2005**.

You lack capacity in relation to a particular matter if at the crucial time you are unable to make a decision for yourself about the matter due to an impairment of, or a disturbance in the functioning of, the mind or brain. This impairment may be permanent or temporary.

Whether you lack capacity must be decided on the balance of probabilities and cannot be based on your age, appearance, medical condition or an aspect of your behaviour.

The Court's assessment of your capacity will be based on:

a) Whether you can understand the information relevant to the decision;

b) Whether you can retain that information;

c) Whether you can use and weigh that information as part of your decision-making process; and

d) Whether you can communicate your decision through speech, sign language or other means.

You will not be regarded as lacking capacity if you are able to understand the information via an explanation given in a way appropriate to your circumstances, through simplified language, visual aids, etc. Nor does being able to retain the information for only a short period necessarily mean that you lack capacity. You must, however, be able to understand the consequences both of your decision and of a failure to make a decision.

The leading judgement on the issue of capacity is **Masterman-Lister v Brutton & Co (Nos 1 and 2) [2002] EWCA Civ 1889**; **Masterman-Lister v Jewell and another [2003] EWCA Civ 70** in which Chadwick LJ said,

> *The authorities are unanimous in support of two broad propositions. First, that mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of the transaction involved when it is explained.*

For the purposes of CPR Part 21, the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law whether substantive or procedure should require the imposition of a next friend or guardian ad litem (or, as such person is now described in the Civil Procedure Rules, a litigation friend).

... a person should not be held unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and simple language; and that he should not be regarded as unable to make a rational decision merely because the decision which he does in fact make is a decision which would not be made by a person of ordinary prudence.

16.4.3. Preventing adoption

There are six steps involved in the adoption of a child:

1. The child is taken into local authority (LA) care; this requires a Care Order, applied for by the LA.
2. The LA gains the consent of one of the adults with Parental Responsibility for the child to be adopted; the child must be older than 6 weeks and the consent must be witnessed by an officer from CAFCASS.
3. The LA must then apply to the Court for a Freeing Order.
4. If consent is *not* given freely, the LA must apply to the Court for a Placement Order.
5. If the Placement Order is granted the child is now available for adoption.
6. The adoptive parents must now apply to the Court for an Adoption Order, but they must wait until the child has been living with them for at least 10 weeks.

Thus a local authority may only place a child for adoption if it has the consent of the child's parent or guardian (**Section 19**, Adoption and Children Act 2002) or if it obtains a Placement Order from the Court (**Section 21**). Parent or guardian means those adults who have Parental Responsibility for the child, so if you are a father without Parental Responsibility the local authority will not need your consent, and you will need to make an application (pretty urgently!) for Parental Responsibility to the Court.

Note: that the LA only needs the consent of one parent (usually the mother), and can use a number of excuses for failing to seek a father's consent, for example, that it cannot locate him (it won't make

much of an effort), that there has been insufficient contact between him and the child, that there are allegations of abuse, etc.

The case of **Re F (A Child) [2008] EWCA Civ 439** involving the 'disgraceful conduct' of East Sussex County Council has shown that local authorities can behave ruthlessly and unlawfully with regard to adoption, commonly motivated by generous financial bonuses. In that case the father was prevented from acting when he needed to because he was in hospital. Instead of allowing him more time, the local authority cynically took advantage of his indisposition. The father's appeal under **Section 24** of the Children and Adoption Act 2002 was dismissed (reluctantly) by majority vote with Lord Justice Thorpe dissenting. As with all Family Court matters you need to act as swiftly as possible; do not, as the father in this case did, rely on a solicitor's letter. Lord Justice Wall said,

> *I find it very dispiriting, some 16 and a half years after the implementation of the Children Act 1989 and some time after the implementation of the 2002 Act, that this court is still having to remind local authorities of the basic principles underlying the legislation.*

If the local authority is proposing to take your child from the resident parent and into care it should issue you with notification of the care proceedings and you should be joined in these proceedings; the case above, however, shows that LAs do not always inform fathers in these circumstances. Again, you should also be joined when the LA commences placement proceedings. It is not always easy to find out what is going on in these situations with regard to your child, or what stage the proceedings have reached. The LA will not want your interference and will do what it can to prevent it; in a case described by John Hemming MP, for example, a father was sent by the LA to the wrong court.

In the case of Tammy Coulter (who spoke out at a family law conference against LAs forcibly taking children into care[420]) the Court ruled that excessive delay – caused by the local authority – meant her mother had become a 'stranger' to her, and so she was sent to be adopted by other strangers. Tammy's reunion with her mother 17 years later proves vividly that the idea of parents and their children becoming 'strangers' as a result of lengthy separation is ignorant nonsense. Tammy's testimony shows that local authorities should make every reasonable attempt to ensure that children stay with their families before giving them up for adoption.

Consider also the case of Winona Varney who was forcibly adopted at the age of 7 but reunited with her family at the age of 16 and said of her adoptive family,[421]

> *They told us they loved us, but it was not an affectionate, cuddly relationship. We looked the part, with a three-bedroom semi-detached house and family holidays in Spain, but there were a lot of rows and tension. I felt more like a pet than their daughter.*

[420] Speech by Tammy Coulter, *In the best interest of the child*, delivered to the Care and Health Conference, 30 October 2006, http://www.fassit.co.uk. With acknowledgements to FASSIT, the Families Anti-Social Services Inquiry Team

[421] Julia Lawrence, *'I was stolen from my mother': The deeply disturbing truth about forced adoption*, Daily Mail, 03 September 2010

If you can provide a good home for your child – perhaps with your new partner – or even for your grandchild, you must fight for this in the Court, and use these important precedents.

You can oppose the adoption process at each step:

16.4.3.1. Opposing a freeing order

If a Freeing Order has already been made by a court, releasing your child for adoption, you must apply to the same court for its revocation using **Form A4** on which you must set out the reasons why you wish to resume Parental Responsibility for your child. You cannot make the application sooner than 12 months from the original order.

16.4.3.2. Opposing a placement order

Once the Placement Order has been made, which authorises a local authority to place a child for adoption, the Care Order which originally allowed the LA to take your child into care no longer pertains so you can no longer apply to have it discharged. The LA now has Parental Responsibility for your child in addition to you and the child's other parent (if there is one). You must first apply for leave of the Court to oppose the Placement Order. The Court must be satisfied that there has been a change in circumstances before it will grant leave.

In the case of **Re P (A Child) [2007] EWCA Civ 616** Lord Justice Wall said,

> *We… take the view that the test should not be set too high, because, as this case demonstrates, parents… should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child, by the imposition of a test which is unachievable. We therefore take the view that whether or not there has been a relevant change of circumstances must be a matter of fact to be decided by the good sense and sound judgement of the tribunal hearing the application.*

The reasons you give the Court for leave must unfortunately now meet the very high standards of 'arguable case' established by Lord Justice Wilson in **Re Warwickshire County Council v M [2007] EWCA Civ 1084** (both sides cited Re P in support of their positions). 'Change of circumstances' is not defined in law, so even when you have proved your case that your circumstances have changed, you will remain at the mercy of the judges' discretion. The case established that the welfare checklist does not apply, as it does in applications to revoke adoption orders, and that the Court's consideration should be whether the applicant has a 'real prospect of success'.

You must have leave of the Court to make the application – only the local authority and the child (through his guardian) can apply without leave.

Once you have been granted leave, you must apply to the same court which made the Placement Order for its revocation using **Form A52** on which you set out your reasons for the application. A Children's Guardian will be appointed to represent your child's interests, and she

will appoint a solicitor. Revocation is governed by **Section 24** of the Adoption and Children Act 2002.

Even after you have made your application to revoke the Placement Order, a local authority can still legally place your child with adoptive parents, it is only 'good practice' if the LA decides to wait for the outcome of the application. This means that a *status quo* can be established which you will find difficult to overturn. Once your child has been placed for adoption, pending the final Adoption Order, you will find it very difficult to revoke the order.

16.4.3.3. Opposing an adoption order

Your next opportunity to oppose the adoption is when an application is made for adoption. Re P held that the court's paramount consideration must remain the welfare of the child, and the welfare checklist therefore applies. By the time the application for the Adoption Order is made, your child will have been living with the adoptive parents for at least 10 weeks, and often for much longer. A new *status quo* has been established which the Court will be very reluctant to change. You cannot apply to oppose the Adoption Order without the consent of the Court, for which you must apply first; again, the Court can only give its consent if there has been a change of circumstances.

An Adoption Order gives the adoptive parents full Parental Responsibility and 'extinguishes' it for all others. It also extinguishes all other existing orders. The courts won't eagerly overturn an adoption once it has reached this stage, on the grounds that to do so would undermine the lifelong commitment made by adopters if they thought the adoption could at any time be undone and would reduce the supply of potential adopters. There is no law which enforces this position, however, and a number of cases have applied pressure on the courts to overturn adoptions, particularly where children have been taken into care on the basis of allegations or evidence which subsequently proved to be false.

So far very few cases been successful, such as Re F (R) (An Infant) [1970] 1 QB 385, in which a mother had not been served with proceedings; Re RA (Minors) [1974] 4 Fam Law 182, in which the order was obtained by fraud and Re F (Infants) (Adoption Order: Validity) [1977] Fam 165 in which the adopters were not lawfully married.

In Re M (Minors) (adoption) [1991] 1 FLR 458 a father had given consent to the adoption of his two daughters by their mother and stepfather unaware that the mother had terminal cancer. After the mother's death the girls came to live with their father and his new wife. The father applied successfully to have the adoption order set aside. Lord Justice Glidewell held that the father's ignorance vitiated his consent. Butler-Sloss LJ ruled that the case did not set a precedent.

Re K (Adoption and Wardship) [1997] 2 FLR 221 is the most recent successful case in which the adoption of a Bosnian child by an English couple was set aside because the procedure had been fatally flawed.

In **Webster (The Parents) v Norfolk County Council & Ors (Rev 1) [2009] EWCA Civ 59** starting at paragraph 145 Lord Justice Wall

reviewed these and other cases but determined that they did not assist the Websters.

This does not mean that no application can be successful. The principles on which new evidence may be admitted were established by Lord Denning in Ladd v Marshall [1954] 1 WLR 1489:

1. The evidence to be admitted could not have been obtained with reasonable diligence for use in the original trial;

2. The evidence must be such as would have a significant but not necessarily decisive influence on the out come of the case; and

3. The evidence must be credible, though not necessarily incontrovertible.

The conditions for revisiting a judgement on the grounds of inappropriate procedure or fraudulent evidence were established in the case of **Taylor v Lawrence [2002] EWCA Civ 90**, [2003] QB 528 (which concerned a boundary dispute). The applicant must show that 'significant injustice' has occurred by introducing new evidence, which must both be true and be accepted by the court's discretion. There must also be an effective remedy to the injustice which has occurred.

> *54. … The residual jurisdiction which we are satisfied is vested in a Court of Appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the Court to confine the use of their jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to re-open proceedings after the ordinary appeal process has been concluded can also create injustice.*
>
> *55. … What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of re-opening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be an important consideration.*

There is an argument, rejected by the Court of Appeal, for so-called 'academic' hearings where the truth is established even though no remedy is applied; in matters of adoption such hearings are considered to be of benefit to the child coming to terms with what has happened to him. Where parents have taken their cases to the European Court of Human Rights the best outcome they have been able to secure is financial compensation (for example £12,000 each in P, C & S v UK; that is less than the £18,000 adoption agencies earn for each child placed). There is little hope that the law on adoption will change soon and the 2006 Children and Adoption Act did not touch on these issues.

In many other jurisdictions with 'open adoption' birth parents are able to maintain visitation rights with their children unless there is clear evidence of risk, and this is obviously a sensible arrangement which keeps everyone reasonably happy. Only in the UK and in those US states which operate a policy of 'closed adoption' are adoptive parents allowed to remain anonymous and birth parents are cut out of their

children's lives altogether, resulting in a vast amount of largely avoidable misery.

16.4.4. Your partner's child

You have formed a relationship with a new partner, or re-married, and you wish to adopt their child so that you can be a proper parent; it is understandable, commendable, but not entirely straightforward.

The relevant legislation is the **Adoption Act 1976** and the **Adoption and Children Act 2002**. Applications are made in the usual way through the courts, but you need to use **Form A58**.

If you are a man wishing to do this the important question is whether or not the natural father has Parental Responsibility (PR). If he hasn't and does not intend to acquire it (or cannot be traced) you should be ok; if he does have PR you won't be able to complete Form A58 until this issue has been dealt with by the Court. To adopt your partner's child you no longer need to be married to her but you must apply for joint adoption, even though she is already a legal parent.

If you are a woman wanting to adopt your male partner's child it is more likely that the mother is out of the picture for one reason or another and that the father has sole residence.

The Court will ask the local authority to prepare a report on whether adoption is in the child's best interests; this will be prepared by a social worker. Obviously your own ex partner (if you have one) can make this process much more difficult, for example by making false allegations against you. Anything the social worker digs up – whether valid or not – could then cause you difficulties if you are also fighting any battles over your own children.

If the natural parent has PR their consent will need to be given, but under Section 16 of the 1976 Adoption Act the Court can dispense with this in certain circumstances:

- The parent or guardian cannot be found or is incapable of giving agreement;
- The parent or guardian is withholding his agreement unreasonably;
- The parent or guardian has persistently failed without reasonable cause to discharge his Parental Responsibility for the child;
- The parent or guardian has abandoned or neglected the child;
- The parent or guardian has persistently ill-treated the child or
- The parent or guardian has seriously ill-treated the child.

An alternative to adoption is to apply for a Residence Order. This would not necessitate the biological parent losing PR, and could be useful if you are trying to get a Shared Residence Order for your own children. Be aware that applying for adoption could provoke the natural parent into attempting to re-establish contact, although that isn't necessarily a bad thing from the child's point of view. A Residence Order will expire on the child's 16th birthday. Note that in the event of your death she won't automatically inherit.

A second alternative is for you and your partner to fill out a Step-Parent Parental Responsibility Agreement (**Form C (PRA2)**), although if a biological parent has PR you will still need their consent for this. Unlike adoption this does not impose on you the responsibility to pay maintenance should you separate, but does give the child protection if your partner should die. This can be a sensible first step to consider before you go for adoption, and it does not take PR away from the natural parent, or involve you in being subjected to examination by social services. The adoption process can be quite a trial.

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16.5. Cases

Re F (R) (An Infant) [1970] 1 QB 385
Re RA (Minors) [1974] 4 Fam Law 182
Re F (Infants) (Adoption Order: Validity) [1977] Fam 165
Re M (Minors) (Adoption) [1991] 1 FLR 458
Re O (A Minor) (Care Proceedings: Education) [1992] 1 WR 992
Re O (A Minor) (Care Order: Education: Procedure) [1992] 2 FLR 7, [1992] 1 FCR 489
Humberside CC v B [1993] 1 FLR 257
M v Birmingham City Council [1994] 2 FLR 141
Re M (A Minor) (Care Order: Threshold Conditions) [1994] 2 AC 424
Re B (Minors) (Contact) [1994] 2 FLR 1
Re S and P (Discharge of Care Order) [1995] 2 FLR 782
Re K (Adoption and Wardship) [1997] 2 FLR 221
Re D (Care: Threshold Criteria) [1998] Fam Law 656
Re B and W [1999] 2 FLR 833
Lancashire CC v B [2000] 1 FKR 583
Re C and B (Care Order: Future Harm) [2001] 1 FLR 611
Taylor v Lawrence [2002] EWCA Civ 90, [2003] QB 528
Re H (A Child) (Interim Care Order) [2002] EWCA Civ 1932, [2003] 1 FCR 350
Masterman-Lister v Brutton & Co (Nos 1 and 2) [2002] EWCA Civ 1889
P, C and S v United Kingdom (2002) 35 EHRR 31, [2002] 2 FLR 631
Re B (Care: Interference with Family Life) [2003] EWCA Civ 786, [2003] 2 FLR 813
Re M (Intractable Contact Dispute: Interim Care Order) [2003] EWHC 1024 (Fam)
Re M; R (on the application of X and another) v Gloucestershire County Council [2003] EWHC 850 (Admin)
Masterman-Lister v Jewell and another [2003] EWCA Civ 70
Venema v The Netherlands [2003] 1 FLR 552
R v LM [2004] QCA 192 (Queensland)
Mabon v Mabon [2005] EWCA Civ 634
A County Council v A Mother and A Father and X,Y,Z children [2005] EWHC 31 (Fam)
Re L (Children) (Threshold Criteria) [2007] 1 FLR 2050
Re P (A Child) [2007] EWCA Civ 616
Re Warwickshire County Council v M [2007] EWCA Civ 1084
Re B [2008] UKHL 35; [2008] 2 FLR 141
Re F (A Child) [2008] EWCA Civ 439
G (R on the application of) v Nottingham City Council [2008] EWHC 152 (Admin)
Bury MBC v D [2009] EWHC 446 (Fam)
Re MA (Care: Threshold) [2009] EWCA Civ 853
Re W (A Child) [2009] EWCA Civ 538
Webster (The Parents) v Norfolk County Council & Ors (Rev 1) [2009] EWCA Civ 59

CHAPTER 17: CHILD SUPPORT

> *To be forced to treat only one (parent) as responsible where there is a Shared Residence Order in operation is grotesque.*
>
> *It is degrading to fathers who actually - and lovingly - tend to their children.* ***A law so framed is so far removed from reality that it brings the law into disrepute.***
>
> Lord Justice Ward[422]

17.1. Child Maintenance

No aspect of the family justice system has been overhauled more often or more extensively than child support; and yet it remains stubbornly unable to fulfil its purpose. Political understanding of the system – and hence political intervention – seldom goes beyond the observation that it fails to collect the money parents are assessed to owe, and that it costs the taxpayer a great deal to run.

The system is currently estimated to cost £601 million more than it collects. It costs the taxpayer £1.97 to collect each pound if you omit those cases in which parents are able to reach agreement themselves. In July 2007 the notorious divorce barrister Nicholas Mostyn (now Lord Justice Mostyn) said of it,[423]

> *The performance of the CSA has been the greatest failure of public administration in the history of this country. The figures are simply mind-boggling. In its history, it has assessed about £8bn in child maintenance, and managed to*

[422] Hockenjos v Secretary of State for Work & Pensions, Court of Appeal: Ward, Arden, Scott Baker LJJ

[423] Nicholas Mostyn QC quoted by Lynn Barber in The Observer, 15 July 2007, http://observer.guardian.co.uk/magazine/story/0,,2124455,00.html

collect about £4bn at a cost of £3bn. You might as well just pay them out of taxes.

The amount unpaid is put at £3.787 billion,[424] though this is a cumulative and not very representative figure because the method of assessment has changed since the figure was first compiled.

The Child Support Agency was established in 1993 under legislation introduced in 1991. When Labour came to power they made some changes to the system which came into effect in 2003. Still the system failed to function as intended and in 2006 Labour commissioned a report – of inevitably limited remit. A complete revision was planned but never fully implemented and the Coalition Government launched a further Green Paper in 2011.

17.1.1. The historical problem

There is no easy way to arrange financial provision for children (and their mothers) after a marriage or cohabitation breaks down. The facts that there are now two households and that either parent may go on to form new relationships and have additional children mean that there is rarely enough money to go round.

In the Middle Ages responsibility for single mothers and their children was taken away from the charity of the Church and given to the Magistrates Courts where it became secularised and subject to legislation. Under the Old Poor Law support was administered locally by the parishes which reclaimed their expenses from the children's fathers; the system was efficient and up to 97% of the cost was recovered.

In 1576 responsibility was transferred again, away from the parishes and directly onto the putative fathers, establishing for the first time a legal and administrative mechanism for the collection of child support. From 1609 fathers who did not pay up could be imprisoned. Money recovered went to the parish, not to the mothers.

By the early 19th Century parishes were spending between 25% and 38% of their budgets supporting lone mothers, though many were also recouping this expenditure, sometimes by allowing fathers to spread repayment beyond the period during which the mother would receive support.

Strongly censorious Christian evangelicalism brought about a profound change in social attitudes which blamed the condition of single mothers on their promiscuity. In 1834 the Old Poor Law was replaced by the New, and sole responsibility for illegitimate children under the age of 16 was transferred to their mothers; if they could not support them they would have to enter the workhouse, which aimed to eliminate the problem of fatherless children by making life within as wretched as possible. Putative fathers were freed of any legal responsibility and could no longer be imprisoned for non-payment, and could thus more easily evade their responsibilities; payments continued to be made to the parish and not to the individual mother.

[424] Child Support Agency National Statistics, December 2010, http://www.childmaintenance.org/en/pdf/qss/QSS_Dec_2010.pdf

The change was so unpopular that within 10 years the Government performed a U-turn, shifting responsibility back onto fathers and allowing mothers but not parishes to pursue them through the Petty Session Courts. Thus bastardy proceedings were no longer conducted under the Poor Laws and became civil proceedings between the parents. Those mothers who could not afford legal recourse turned to the parishes, which then could not recoup their expenditure from the fathers. In 1868 the law changed again to restore to parishes the power to recover maintenance costs from putative fathers. In 1878 the Matrimonial Causes Act gave magistrates jurisdiction in divorce cases via separation orders, and provided a minimum level of maintenance, it also established another complicating layer of jurisdiction. This measure re-criminalised the non-payment of child support, and a man who did not pay could be arrested, summoned or have his assets sold. Most non-payers were imprisoned for up to 3 months; such punishment, however, cancelled the debt, and so mothers remained the losers in the system.

For a mother to prove 'affiliation' (literally, the adoption of a son, i.e. the obligation of a named father to take financial responsibility for a named child) necessitated lengthy and difficult enquiries in the public courts of the Quarter Sessions. In 1872 a father could pay a maximum of 5 shillings a week under an affiliation order; this rose to 10s in 1918 and to £1 in 1925, and did not change again until 1952 by which time it was worth about £20 in today's terms. In 1914 collection officers were appointed, but the onus for collection and enforcement still remained with the mothers who could only bring actions – if they could afford to – after the child's birth, and so were often impoverished during the crucial time before.

From 1935 a man could only be imprisoned if he had the means to pay, and so the numbers imprisoned fell. Most men, particularly if they had a second family, simply couldn't afford to pay, and punishment worked in no one's interest, least of all the State's which then had to pay both parents' upkeep. The Beveridge report of 1941 led to the formation of the Welfare State which was intended to eliminate the 'five giants' of want, ignorance, squalor, idleness and disease. Beveridge had requested evidence from women's organisations on the issue of single parenthood, but none responded; he recommended state support, but Atlee's Government rejected this on the grounds of cost. The State treated widows and divorcees more sympathetically than unmarried mothers; widows were eligible for benefits not available to unmarried mothers who could depend only on Supplementary Benefit and charity if they did not receive maintenance.

In 1946 the Government introduced the Family Allowance payment. This followed campaigning by early feminists such as Eleanor Rathbone, whom we met in the **Introduction**. She and her supporters didn't merely want equality with men and argued that women could not achieve equality on men's terms within a workplace which had evolved to suit men: true wage equality, she recognised, was not attainable. Instead she wanted financial recompense for women regardless of whether they decided to work outside or within the home and for the State to recognise women as mothers by paying them a guaranteed weekly cash allowance to bring up their children – a wage for motherhood. Other feminists within NUSEC aggressively opposed this idea: they believed that paying poor women to be mothers constituted the sale of motherhood and could not lead to women becoming financially independent of men.

Family Allowance was initially paid to fathers, and only paid to mothers following protests by Rathbone and amendment just a few months before her death. In 1977 Family Allowance and the Child Tax Allowance which accompanied it were combined into Child Benefit, the difference is substantial: an allowance is yours to keep, a benefit is the State's to give. Modern arguments about the alleged gender pay gap should take Child Benefit into account.

The Second World War was followed by a sharp rise in divorce. In 1948 the National Assistance Act gave husbands and wives equal liability for supporting each other and their children. The Maintenance Orders Act of 1958 sought to find an alternative to prison by enabling deductions from earnings; legal aid for affiliation actions was introduced, and in 1968 authority for collection was handed to the Supplementary Benefits Commission and the liability limit on affiliation orders was removed, but assessments remained low to increase the likelihood of fathers at least paying something.

1968 also saw publication of the Finer Report on One-Parent Families, the first time the condition of lone parents had been properly examined. Its aim was to reduce the number of lone parents receiving Supplementary Benefit, which by 1972 had reached 238,000. The authors recognised the difficulty of combining child care and work, and recommended that the State rather than fathers should support single mothers: even when maintenance was paid in full it was rarely enough to raise a family. They recommended transferring responsibility for assessing and collecting maintenance from the Magistrates' Courts to the Supplementary Benefits Commission, and a single benefit for lone parents which would support the mother as well as the child, to be collected from the father. Although the report was rejected due to the cost of implementation – estimated at £190 million a year – it had a significant impact on future thinking.

The Social Security Act 1986 mandated that both men and women were liable to maintain their children to the age of 19, even if they were divorced, separated or the child was illegitimate. If a person for whom another was liable was claiming benefits, the liable person could be ordered to pay an 'appropriate sum'. The Family Law Reform Act of 1987 abolished affiliation proceedings, and the legal distinction between legitimate and illegitimate children. Unmarried fathers were encouraged to take responsibility by according them rights.

By the late 1980s only 7% of the cost to the taxpayer of supporting lone parents was being recovered from 'liable relatives'.[425] Sixty per cent of single mothers were receiving benefits but only a third were in receipt of maintenance payments. Lone parent benefits had increased from £1.4 billion in 1981/2 to £3.2 billion in 1988/9; lone parent numbers had grown from 330,000 to 770,000 (and there are now 1.9 million[426]); the cost of child support had risen to £6.6 billion because it was easier and more attractive for mothers to rely on the State than on their children's fathers (by 2003 it had increased to £22 billion[427]). The Welfare State was seen by Government and taxpayer alike to be out of control.

This situation should also be seen against a background of increasing family breakdown: divorces involving children had more than doubled

[425] Davies, G., *Child Support in Action*, Hart Publishing, 1998
[426] Source: Gingerbread
[427] Brewer, M., and Adam, S., *The financial costs and benefits of supporting children since 1975*, Institute for Fiscal Studies, 2004

since 1970; most of these were initiated by wives, and fathers were being excluded from their children's lives at an alarming rate thereafter. In the same period the proportion of children born outside marriage nearly quadrupled from 8% to 30% (and now approaches 50%).

The Conservative Government was terrified of the growing 'dependency culture' and in the face of the replacement of traditional marriage by serial monogamy sought to restore time-honoured values through its notorious and ill-fated 'back to basics' campaign. They wanted to swing public opinion against the relentless growth of single parent numbers, but the behaviour of some irresponsible Government ministers irreparably undermined this. Family breakdown threatens society more than any other ill, and it is understandable that governments fear and attempt to control it; child support reform has enabled governments to fiddle endlessly while leaving the underlying causes unaddressed.

Paradoxically one of these causes is child support itself, coupled with Child Benefit. When paid at a level sufficient to support children these payments enable mothers to leave relationships and thus they subsidise family breakdown. Fathers who are expected to contribute financially are effectively being asked to fund a system which denies them their family life and denies their children the right to have a father. Family Allowance handed society a responsibility and an interest in the rearing of children, but the value of those children to society depended upon their being reared within the family. Eleanor Rathbone had envisaged that the allowance would be paid only to married mothers,[428] but by divorcing that responsibility from the family and handing it to the state she had set in motion a rupture which would eventually tear children away from the family altogether. In time her well-intentioned wage would turn into an uncaring and bureaucratic engine of mass fatherlessness.

17.1.2. The 1991 Act

In 1990 the Social Security Advisory Committee, set up to resolve the funding problem, noted that while the number of lone parents claiming benefits was increasing, the amount of maintenance paid by non-custodial parents had remained static. A White Paper, *Children come first*, in October was succeeded by the **Child Support Act** the following year which in turn enabled the establishment of the Child Support Agency (CSA) in 1993. Essentially the system was an off-the-shelf copy of the American one; the US and UK faced similar problems over the enforcement of child support and the Reagan and Thatcher governments adopted similar ideologies. Implementation was rushed and there was no pilot scheme; staff were recruited from the inefficient and ineffective predecessor of the CSA, the 'liable relatives unit' of the DSS, or from the private sector with no experience of public sector working.

The Act was a fudge, hastily and inadequately debated and implemented, a Treasury-led scheme to reduce benefit payments to single mothers by targeting predominantly middle-class non-resident fathers so as to maximise yield. Whereas child support had hitherto

[428] Ibid., p. 360

been assessed according to the financial cost of supporting a child, with those costs being recovered from the father, this Act redefined child support as a percentage of the father's income. In the House of Lords debate on the Bill Lord Haughton clarified,

> *This bill is not a child support bill; it is a taxing bill. I am surprised the Chancellor of the Exchequer has not accepted it as a money bill and included it as a schedule to the finance bill… it is a middle class approach to continuing obligations of men towards their children*[429]

The act polarised parents by gender into the caring and the paying. The 'welfare of the child' promoted by the 1989 Children Act in effect became reduced to a financial contract which was now legally enforceable, and aimed to challenge the prevailing consensus that a father's primary responsibility was to any second family he might have while the State would take care of his first. The anti-social behaviour caused by fatherlessness was beginning to have serious consequences and to be better understood; the Act proposed that a man's first duty was to the State and not to his children, expressing the vain hope that he should have no more children than he could afford. One reason fathers go on to have second families, of course, is that they lose their first in the Devil's Labyrinth of the Family Courts.

The Act was intended by well-intentioned people – with cross party backing – to ensure adequate financial support for the children of separated parents. It was designed, by perhaps less well-intentioned people, to prevent poor children becoming any wealthier by keeping the cost to the taxpayer of maintaining these children to a minimum. The Act entirely ignored the social changes of the preceding 50 years; by expecting a divorced man to continue to support his ex-wife financially, it disregarded the fact that since World War II mothers had also become wage-earners. In effect the Act was trying to make fathers responsible not only for their children, but also for the massive State spending on single mothers; fathers resisted, and the Act thus failed to secure either.

The 1991 Act introduced a rigid and complicated formula for the calculation of maintenance, requiring more than 100 items of data, and replacing a system which had been discretionary and elastic, but inconsistent. Responsibility for assessment, collection and enforcement was handed to a new body, the Child Support Agency, something recommended originally in the 1974 Finer Report. The system of child benefit introduced by the Conservatives relied on two calculations. The first determined which parent should pay the other. The second determined how much that payment should be. The first calculation was very simple, the second very complicated.

To determine which parent should pay, the system counted how many nights in a week a child spent with each parent. The parent with whom the child stayed for the shortest time became the liable parent. This binary, black and white approach to parenting has resulted in the most appalling injustice: the system denies the reality of parents sharing parenting, and begins with the assumption that separated fathers have entirely abandoned their children. The CSA's definition of child support reveals this falsehood, 'child maintenance is money paid when parents live apart and the child normally lives with only one of their

[429] Lord Haughton, Hansard, 25 February 1991, col. 812

parents, or with neither.'[430] 'Normally' in this context really means 'invariably' and there is no provision in the regulations for a child who lives more or less equally with both parents.

As originally conceived, the Child Support Act 1991 could actually cater for equally shared parenting,

- The legislation imposed on the 'absent' parent 'the duty to maintain' (Section 1(1)) his 'qualifying child' 'by making periodical payments of maintenance' (Section 1(2)).
- A child was a 'qualifying child' if one or both of his parents was designated 'absent' (Section 3(1)).
- A parent was designated 'absent' either if he did not live in the same household as the child, or if the child lived with a person who was designated a 'person with care' (Section 3(2)).
- A 'person with care' either lived in the same household as the child, or provided day to day care for the child (Section 3(3)).
- The Act emphatically made clear (Section 3(5)) that 'For the purposes of this Act there may be more than one person with care in relation to the same qualifying child'.

So if there were two households in which the child lived, with two 'persons with care' (PWCs) providing care for the child, neither PWC was 'absent' and the child was not then a 'qualifying child'. Nothing in the Act prevented this arrangement. If the child did not qualify then neither parent had a 'duty to maintain' – i.e. pay money through the Agency.

Unfortunately the Government wanted the child support system to be a tax-collecting and self-funding one; it was imperative, therefore, that an assessment be made in all cases so that money could be siphoned off to the Treasury. A situation of equally shared care was intolerable. A further piece of legislation therefore had to be introduced in 1992 to deal with such 'special cases' before the CSA went live.

Regulation 20 of the Child Support (Maintenance and Special Cases) 1992 No. 1815 accordingly demands that where 'two or more persons who do not live in the same household each provide day to day care for the same qualifying child' the case must be treated as a 'special case', and one of the two or more 'persons with care' must perversely be regarded as 'an absent parent for the purposes of the Act'.

In other words, in a situation in which the parents have separated but are nevertheless sufficiently mature to work out their financial obligations cooperatively the State will intervene in order to screw that up and re-engineer the situation so that the children are likely to lose a parent.

Where care is shared equally, the 'absent' parent is to be defined as 'the parent who is not in receipt of child benefit for the child in question'; and payment of Child Benefit is in turn determined by the discriminatory **Social Security Contributions and Benefits Act 1992**. Schedule 10 of this – enforced by Section 144(3) – deals with the

[430] *What is child maintenance and how does it affect me?*, CSA, http://csa.gov.uk/en/PDF/leaflets/new/CSL301.pdf

'priority between persons entitled to child benefit' and specifies that 'between a husband and wife residing together the wife shall be entitled' and that 'between two persons residing together who are parents of the child but not husband and wife, the mother shall be entitled.' Where neither parent is in receipt of child benefit, the child support officer must decide, without grounds or guidance, which parent is to be regarded as 'absent'.

The result of this legislation is that 95.1%[431] of parents designated 'absent' are fathers. Absence is a purely fiscal definition. The term does not mean that this person necessarily cares for their child any less than another person, or that the child normally doesn't live with him, it simply means that they must pay child support. A parent can be present, hands-on, and yet technically 'absent': you don't have to be absent to be an 'absent father'; you just have to be a father.

This is incontrovertible sex discrimination, and its effect is that the mother, who looks after the child for only half of the time, is deemed to have discharged her entire maintenance responsibility simply by virtue of being the person with care, and that her income is entirely disregarded (which makes assessment easier). The father who looks after the child for the remaining half of the time however is only permitted a deduction of 1/7th of the maintenance requirement for each night per week that he looks after the child. The calculation is made over the course of a year, so the fraction subtracted is:

For 52 to 103 nights:	1/7
for 104 to 155 nights:	2/7
for 156 to 174 nights:	3/7
for 175 nights or more:	1/2

Thus, the care being shared equally, the total maintenance he is required to pay the PWC is reduced by 50% and he still has to pay the remaining 50% to the PWC even though there is no reciprocal requirement for the PWC to contribute to the NRP's costs when the child is with him. This is notwithstanding the fact that his housing and care expenses will, all other things being equal, be exactly the same as those of the PWC.

The apologists' argument is that even when her children are not with her, the mother must still pay for their accommodation, and other expenses, and thus the father should pay. This argument is negated by the fact that the father too must still pay for accommodation and other expenses when his children are not with him.

The CSA formula only kicks in when the NRP's income reaches a minimum level. Only about a quarter of NRPs earn this amount. Nearly half of NRPs (46.9%) live on benefits which are set by definition as the minimum the individual needs to live on; this minimum however must be reduced by having child support taken from it, the NRP will thus be driven into poverty. Any time he spends with his children will have to be paid for out of his benefits. If the NRP finds that looking after his children half the time is too expensive, his liability will increase. A separated mother with children however can receive Child Benefit and Child Tax Credits on top of her Housing Benefit and Income Support.

[431] Child Support Agency National Statistics, June 2011, http://www.childmaintenance.org/en/pdf/qss/QSS_june_2011.pdf

Fathers find themselves in a Catch 22 situation. While mothers receive considerable financial support to bring up their children regardless of their income, fathers receive none. In particular any housing benefit they receive will only cover the cost of their own accommodation, it won't provide for sleeping accommodation for their children. Of course, it is fair that the taxpayer should not have to pay twice, but what this means in practice is that without appropriate accommodation the Family Courts will not award fathers overnight staying contact with their children. If there are distances between fathers and mothers – and fathers must usually bear the costs of travel as well – this can mean that fathers end up with little or no contact with their children, they simply can't afford it. Society then writes them off as 'deadbeat'. If, on the other hand, they decide to avoid paying the CSA, so that they have a little bit more money to spend on contact with their children, society will again write them off as 'deadbeat'.

It is essential to grasp this point: the present child support arrangements actually disrupt the relationships between children and their non-resident parents, forcing fathers to become 'McDads', meeting their children for a couple of hours every other weekend in a fast food restaurant, or causing children ultimately to lose a parent. From the perspective of the Government this is desirable: it disguises the inequality in the system, it maximises the revenue flowing from the non-resident parents, it provides an essential scapegoat, and it keeps the divorce industrial complex rolling along. But how does it support children?

The formula for child support ignored the Finer Report and took no account of a father's (in)ability to support two families on one income; many fathers were assessed for such large sums, and were harried to such an extent by the CSA, that they took their own lives. A number of organisations upholding fathers' rights began to emerge, campaigning for lower assessments and for the Government to encourage lone mothers to return to work.

The CSA treated fathers as criminals, relentlessly hounding those who paid, but failing to pursue those who didn't. The child support system became yet another area of enforcement which specifically targeted men and denied them the protection of due process, declaring them guilty of a gender crime without evidence or trial. The CSA thus managed to earn the equal contempt of both fathers and mothers. It combined an unprecedented invasive, intrusive State machine with unparalleled incompetence and managerial failure and the 1991 Act became the most controversial piece of recent social policy legislation; some 20% of letters to MPs are said to concern the CSA.

A series of amendments to the Act was enabled in the Child Support Act 1995, the Social Security Act 1998 and the Welfare Reform and Pensions Act 1999. Many of these changes came about through public pressure and most of them benefited to some degree middle-class fathers who wished to distance themselves from the truly feckless. The changes introduced what were called 'departures', that is, variations to the basic calculation to allow for a greater consideration of his expenses. From 31st January 2001 under Regulation 2 of the **Child Support (Information, Evidence and Disclosure and Maintenance Arrangements and Jurisdiction) (Amendment) Regulations 2000** the term 'absent parent' was replaced by 'non-resident parent'; nevertheless, 'absent' remained the term of choice for many commentators.

It is easily understandable that responsible fathers, fully intending to remain very present in their children's lives and to play a conscientious and committed role, and equally ignorant of the wording of the Act, were enormously resentful at being described as 'absent' or considered that the term and therefore the legislation did not apply to them. Many couples when they divorced or separated intended to share the care and upbringing of their children more or less equally between them. The intervention of the CSA made this practicably impossible.

Even when he cares for his child 50% of the time, a non-resident parent will still have to pay the resident parent; there is no reciprocal arrangement through the CSA whereby the resident parent pays him, indeed her income is never even accessed. Where the maintenance liability, according to the formula to be applied, is less than zero, instead of the resident parent having to pay, no money changes hands.

When children really do live with one parent, and the other parent really is absent, any amount of money coming from the absent parent will benefit the child, but where the parenting is equal, or approaches equality, the money actually flows *out* of the family, and the CSA thus makes the children *poorer*. This is because the CSA is a *taxing* agency and not a *child supporting* agency. The result is that in Britain it is entirely acceptable for a father to abandon his child today as long as he pays tomorrow.

17.1.3. First reform

It is instructive to understand first how the change from CS to CS2 came about. The change of government in 1997 led to an immediate replacement of the chief executive of the CSA and to the appointment of Baroness Hollis as the Minister to oversee reform. A new scheme was introduced in 2003 with a simplified calculation and fewer variables. There was no radical thinking involved in this, it was simply designed to be administratively easier, leading to quicker assessment, greater accuracy, greater predictability and greater compliance, aims which were never achieved. It sacrificed flexibility and fairness.

The Government needed a much simpler formula so that it could calculate the level of financial contribution appropriate for a non-resident parent to make. In July 1998 the CSA Reform Green (consultation) Paper [432] announced the 15%, 20%, 25% rates. Two items of research were cited: *The Costs of Children and the Welfare State*, [433] which was based upon the Family Expenditure Surveys published between 1970 and 1986, and *Small Fortunes: Spending on children, childhood poverty and parental sacrifice*,[434] the Green Paper

[432] *Children First: a new approach to child support*, (CSA reform Green Paper) Command paper Cm 3992, July 1998

[433] Richard Dickens, Vanessa Fry, Panos Pashardes, *The Costs of Children and the Welfare State: An Empirical Analysis based on Consumer Behaviour*, Discussion paper series no 466, Department of Economics, University of Essex, December 1996

[434] Sue Middleton, Karl Ashworth and Ian Braithwaite, *Small Fortunes: Spending on children, childhood poverty and parental sacrifice*, Published by the Joseph Rowntree Foundation, ISBN 1 85935 032 1

stated, 'Overall, there are indications that the cost of a child represents between 20 per cent and 30 per cent of the budget of a family with one child'.

In July 1999 the CSA Reform White (policy) Paper was issued; it didn't refer to *The Costs of Children*, only to *Small Fortunes*, and said, 'The proposed base rate of 15 per cent of their income is roughly half the average that an intact two-parent family spends on a child'. But *Small Fortunes* never actually identified a formula for expenditure based on percentages of income. The White Paper attributed the research to the wrong source.

In fact *The Costs of Children* research showed that a single child cost about 10% to 15% of the total expenditure of an intact family, depending on age (older children cost more), if (big if) the household expenditure was equal to the income. So as well as attributing the research to the wrong source, the White Paper also doubled the percentages.

The White Paper then made an extraordinary arithmetical howler: it assumed that if an intact family spent 30% of their net income on one child, then the contribution made by each partner was 15% of his or her income. This is the meaning of the statement, 'The proposed base rate of 15 per cent of their income is roughly half the average that an intact two-parent family spends on a child'. By sheer good fortune these two errors cancelled each other out, so that Baroness Hollis was able to say, 'On average about a third of a couple's income tends to go on the support of their children, so 15 per cent from one parent in a separated family seemed about right'.[435]

The average payment fell under this reform from about £39 per week to £29, which was 'about right' for a single child, provided the mother's share of the support was also provided either from her income or by the State. Very often it wasn't, and so only those mothers who were already better off benefited from the reform. Despite the agenda to end child poverty, this was still a tax measure, and the CSA remained a tool of the Treasury. At the end of June 2011, the average maintenance calculation was £33.50 per week (excluding zero calculations).[436] Cases currently are split 32% on the old scheme and 68% on the new, with an additional 101,500 cases which are calculated manually or 'clerically' (up from 98,400 in December 2010).

17.2. Henshaw & CMEC

In February 2006 the Government asked Sir David Henshaw to produce a report on the CSA looking exclusively at improving enforcement, reducing costs and options for transferring cases to a new scheme; in July he produced his report.[437] As Henshaw made clear in his Introduction, this timetable did not allow for a full re-

[435] Baroness Hollis, giving evidence on the Green Paper to the Social Security Select Committee, 22 July 1998, soon after the Green Paper was issued, http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmsocsec/1031/8072201.htm
[436] Child Support Agency National Statistics, June 2011, http://www.childmaintenance.org/en/pdf/qss/QSS_june_2011.pdf
[437] Sir David Henshaw, *Recovering child support: routes to responsibility*, July 2006, http://www.dwp.gov.uk/childmaintenance/pdfs/Henshaw_complete22_7.pdf

design and he was only able to indicate the direction a new design might take. The report did not look much beyond compliance and enforcement. A great opportunity was missed.

Following the report the Government established a new body, the Child Maintenance and Enforcement Commission (CMEC) which would run child maintenance and of which the CSA would be an executive agency; in January 2008 the Secretary of State for Work and Pensions, Peter Hain, announced to nobody's surprise that Stephen Geraghty, the Chief Executive of the Child Support Agency, would become the Commissioner of the new Commission. Some changes were implemented, but the full reforms intended were not enacted, possibly because the Government remained contractually committed to the old computer system until 2010. We shall look at some of the changes Henshaw recommended.

17.2.1. Four principles

The new scheme was supposedly based on 4 principles:

1. to ensure that parents took financial responsibility for their children,
2. to encourage parents to agree their own maintenance arrangements,
3. to provide a more professional service,
4. and to provide a simpler and more accessible service.

The first principle was superfluous and patronising: it addressed a prejudice, not a problem founded in hard evidence. The second, as we shall discuss, could only be of limited application, while the third and fourth were just pie in the sky.

Blunt enforcement rather than intelligent reform remained the key tactic. The 1991 legislation stayed in place with only Sections 6 (imposing the automatic involvement of the CSA following a benefits claim) and 46 (which is dependent on 6) repealed. Everything else was either a cosmetic re-branding exercise or an attempt to enforce compliance.

Since October 2008 some of the recommended reforms have been introduced but new applications continue to be processed according to CS2. Parents have been able to negotiate private maintenance agreements, and they have begun to benefit from the 'benefits disregard'. It is unlikely, however, that the target of transferring all clients to the new system by 2012/14 will be met.

17.2.2. Private agreements

Labour believed that parents should be able to make private agreements without State intervention, and that removing the automatic referral of benefits cases to the CSA would give NRPs an incentive to do so. The implication was that where private agreements failed it was the fault of the NRP, presumably because NRPs were considered eager to evade their responsibilities. Imposing the charge on a PWC, on the other hand, would have discouraged allegedly 'vulnerable and low-income' PWCs from seeking maintenance.

Moreover, this measure now means that any PWC who applies for CSA intervention is antagonistic by definition, further destabilising relationships, jeopardising contact, and increasing hostility. It is disheartening that the emphasis was so heavily on making these services chiefly available to PWCs, and it further served to reinforce the perception that NRPs are criminalised by the system. Fathers are just as much victims of family breakdown, more so when they lose their children, and no less in need of support. By March 2010 applications had fallen by 76% on the same period the previous year,[438] showing the policy was apparently successful.

17.2.3. The benefits disregard

In October 2008 the 'benefits disregard' was increased from its previous £10 per week to £20 and since April 2010 all maintenance paid has been disregarded. When first announced the upper limit was to have been £40[439] but few parents would have benefited as the average maintenance payment was considerably below this. The scheme was presented as an incentive for NRPs to pay, rather than as a principle; and yet this is money paid by a parent for the support of their child, there is no moral justification for using it to offset money paid by the Government for the support of an adult. The original recommendation in the Henshaw report, now adopted, was to disregard the full amount, which would have been an average of £24 per week under the proposed system, and thereby theoretically lift a further 80,000 to 90,000 children out of poverty. Labour's response was muddied by trying to combine different functions for the CSA, in this case, the need to be Treasury-neutral.

Increasing or extending the benefit disregard gives some PWCs a financial interest in maintenance which previously they did not have, and so could actually increase the number of applications made. Child support is usually a small percentage of their overall income, and this reduces their incentive to cooperate with the CSA. Only mothers whose former partners are paying in excess of £10 per week see any additional money, so the poorest are unaffected.

Increasing the disregard has unintended consequences as well; a report in July 2008[440] estimated that single mothers would be on average £40 per month better off. The American academic Libertad Gonzalez established a direct correlation between benefit levels and the incidence of single motherhood;[441] this rise would indicate an increase in the number of single mothers in England and Wales of up to 50,000 – funded, ironically and shamefully, by the very fathers the scheme helps to exclude.

[438] National Audit Office, Memorandum for the House of Commons Work and Pensions Committee: Performance of the Child Maintenance and Enforcement Commission, December 2009, http://www.nao.org.uk/publications/0910/child_maintenance_memorandum.aspx

[439] Department for Work and Pensions press release, *50,000 more children lifted out of poverty 350,000 children to benefit from extra money*, 09 October 2007, http://www.dwp.gov.uk/mediacentre/pressreleases/2007/oct/hse-41.asp

[440] Ian Dury, *Welfare shake-up will see £40-a-month boost for single mothers*, The Daily Mail, 22 July 2008, http://www.dailymail.co.uk/news/article-1037135/Welfare-shake-40-month-boost-single-mothers.html

[441] Libertad Gonzalez, *The Effect of Benefits on Single Motherhood in Europe*, Department of Economics and Business, Universitat Pompeu Fabra, Barcelona, Spain, March 2006, http://www.econ.upf.edu/~gonzalez/.

17.2.4. Assessment & collection

The new assessment aims to simplify the formula further than CS2 did, and to make the process faster and more accurate, but it also allows fewer variations to the basic formula and thus fails to take into account the differences between people's circumstances, something that had always been a serious criticism of CS2.

Following recommendations from Sir David Henshaw's report, New Labour proposed to derive the information about a liable parent's income directly from HM Revenue & Customs rather than by approaching the parent for details; assessment would be based on the latest completed tax year. Many beneficiaries of child support wanted the Government to go further and use the Revenue as the collection agency; nevertheless, deriving information in this way is seen as distrustful and a further intrusion by the State into private affairs – it must be remembered that the majority of liable parents do not evade payment.

The scheme makes a deduction from earnings order the basic method of payment if voluntary agreements cannot be made; this is perceived as immensely prejudicial as it is again based on the assumption that liable parents will otherwise try to evade payment. It is also possible to argue that there should be a voluntary element involved in the payment of child support since children need to know that the non-resident parent still cares. For many children denied contact, the knowledge that their parent is still paying child support is the only indication that they exist, or that they remain committed in any way to their child.

Under CMEC assessments will only be modified if income varies by 25%; under the older schemes assessments are altered when income changes by 5%. Otherwise assessments will only be reviewed on an annual basis. It remains to be seen whether this will cause substantial hardship to either party.

It is also the intention to base assessment on gross rather than net income, rendering calculations of tax and National Insurance unnecessary – it was considered wasteful to have more than one government department performing this calculation. This means a change from the 15, 20 and 25 percent rates. Henshaw and the White Paper recommended 10, 15 and 20 percent, but the figures were changed to 12, 16 and 19. The flat rate for NRPs on benefits increased from £5 per week to £7. Assessable income will be reduced where there are other children living with the liable parent. Clearly this is just a simplistic adaptation of the old system, rather than a 'clean break' from it. One effect of these new rates is to increase assessments slightly.

The CMEC system is designed to speed up applications, to simplify calculations, to prevent non-resident parents from withholding information by processing only three pieces of data, and to make non-compliance more difficult. It seems probable however that it will be subject to the same criticism levelled at the 1991 system: that it was unfair, and failed to take into account many payers' financial commitments and circumstances.

17.2.5. Enforcement

The failure of the CSA was seen by Labour, Opposition and many commentators as a simple failure to enforce. Non-payment was explained in unsophisticated terms as the refusal by 'feckless fathers' to accept responsibility for their children. No other possible reasons for non-payment were considered; non-payment will simply not be tolerated. This stance politicises the non-payment of child support and turns it into a gender crime. Again, the preference under the new system is for parents to make their own agreements, with or without State support.

If in the opinion of the CSA you have not paid the child support you are assessed to owe, there is a variety of options available to persuade you to comply. If a parent is breaking the rules – however unjust they may be – there is no defence which will help him evade penalty. Sanctions include:

- Removal of money directly from his bank account without a Court Order;
- A deduction from earnings order – this is a Court Order which allows the State to take up to 40% of a parent's earnings at source; money can also be taken from benefits or pensions;
- The sending of bailiffs – this is more of a threat than an effective solution, as bailiffs cannot force entry, though they can legally gain entry through an open window; goods seized can then be auctioned, though this will usually cost more to implement than it will recover;
- Third party debt orders – this means taking money from a parent's debtors, and includes taking money from bank accounts. If he is running his own business this could make it impossible for him to trade;
- Charging orders – this involves forcing the sale of any properties a parent may own. It has to be commensurate with the debt though, and forcing the sale of a valuable property to pay off a small debt is unlikely to be ordered by a court;
- Recovery of arrears from a parent's estate should he die or commit suicide;
- Registration of the debt – this will affect a credit rating;
- Confiscation of a driving licence or travel authorisation for up to two years (enabled by **Part 3** of the Welfare Reform Act 2009);
- Confiscation of passports;
- Curfew orders – these were not part of Henshaw's recommendations and are particularly controversial: the most serious objection to them is that they will make it very much more difficult or even impossible for many NRPs to retain contact with their children;
- Tagging orders;

- Prison – this is the last resort. Note that going to prison will not discharge the debt.

As a number of NRPs have found out, sanctions can be severe. Loss of a driving licence will quite likely result in the loss of a parent's job (and possibly therefore his home) and render him unable to stay in contact with his children. Prison can have the same effect. A parent can delay legal action to some extent by offering to pay part of the debt.

Previously, before pursuing parents through the courts for payment, the CSA had to obtain a Liability Order from the Magistrates' Court; this requirement has now been removed, and the Liability Order replaced by an Enforcement Order. This removes the need for the CSA to prove liability, further criminalising parents and undermining their rights by denying them access to legal process. Additional powers introduced in April 2009 were intended to allow the CSA to impose the equivalent of Charging Orders by which debts may be recovered from the sale of a parent's property; in February 2011 the CSA reported it had obtained 100 such orders.[442]

Other options include the plundering of share and property portfolios, leading to warnings from lawyers that fathers would challenge such moves on human rights grounds.[443]

These powers usurp the authority of the Court and hand it to an unproven agency whose predecessor has been uniquely incompetent and untrustworthy. According to the National Audit Office, which refused to approve the CSA's accounts for many years, '65 per cent of the cases where a liability order was sought were inaccurate'.[444] The CSA now claims that accuracy has improved, but they have changed the way in which it is measured to boost the figures; the NAO estimate that in CS2 calculations there are £4 worth of errors in every £100 calculated, and £2 worth in CS calculations. As the balance swings from the old system t the new, therefore, we can expect an increase in error.

It will also be possible to have liable parents searched, and any money found on them will be taken in payment. These same powers will be used to recover outstanding debts, aided by private sector debt-collectors. Where NRPs have died (or been driven to suicide) the debt will be recovered from their estates. A final strategy was the much publicised one of placing the names of NRPs who are successfully prosecuted on the CSA website: 'naming and shaming' – this was implemented early, but proved ineffective and was abandoned in a U-turn deeply humiliating to the Labour Government.

Child support is the consequence of the curtailed relationship between NRP and child: reduce contact and the payment must be increased, but the equation works the other way too: increase the payment, or make it impossible to avoid, and contact will diminish because there is no longer an incentive on the PWC to cooperate. If, as intended, the reform and establishment of CMEC make avoidance impossible, contact

[442] Child Support Agency National Statistics, December 2010, http://www.childmaintenance.org/en/pdf/qss/QSS_Dec_2010.pdf
[443] Isabel Oakeshott, *Absent fathers risk raid on shares*, The Sunday Times, 11 May 2008, http://www.timesonline.co.uk/tol/news/politics/article3908380.ece
[444] The National Audit Office, *DWP Child Support Agency – Implementation of the Child Support Reforms*, 30 June 2006 (paragraph 4.24), http://www.nao.org.uk/publications/nao_reports/05-06/05061174.pdf

will reduce further or disappear entirely for many children. That outcome will be disastrous. Policy which is based narrowly on increasing compliance could therefore have a devastating impact on levels of contact and on children's emotional and social development.

17.2.6. Joint registration of births

In November 2009 the Labour Government's Welfare Reform Bill received Royal Assent. **Schedule 6**, Part 1, 4 **2B** of the Act provides that an unmarried mother must name the father on a birth certificate. She can get out of this obligation if she declares in the presence of the registrar one of these conditions:

> *(a) that by virtue of section 41 of the Human Fertilisation and Embryology Act 2008 the child has no father,*
>
> *(b) that the father has died,*
>
> *(c) that the mother does not know the father's identity,*
>
> *(d) that the mother does not know the father's whereabouts,*
>
> *(e) that the father lacks capacity (within the meaning of the Mental Capacity Act 2005) in relation to decisions under this Part,*
>
> *(f) that the mother has reason to fear for her safety or that of the child if the father is contacted in relation to the registration of the birth, and*
>
> *(g) any other conditions prescribed by regulations made by the Minister.*

Mandatory joint registration of births places fathers on a much more equal footing with mothers, though there are exemptions as listed above. Condition (*f*) is the most controversial and the Government is considering opt-outs where a social worker or medical practitioner recommends it as well as registration of paternity even where it is against a mother's wishes. This is not equality (there is no possibility that a violent or abusive *mother* will not be put on the birth certificate), but it is better than pre-existing system.

The Bill had been based on the June 2008 White Paper, *Joint birth registration: recording responsibility*, [445] which proposed obliging unmarried mothers to allow fathers to add their names to birth certificates. It stated, 'the Government is still determined to develop a culture in which the welfare of children is paramount and people are clear that fatherhood, as well as motherhood, always comes with both rights and responsibilities'. This in turn followed a Green Paper in June 2007, *No one written off: reforming welfare to reward responsibility*, [446] which stated, 'this focus on fathers is in recognition of the significant influence their presence or absence from children's lives has on child and family outcomes'. It also recommended improving the registration service to identify risks such as, for example, fathers who are in danger of becoming detached from their children's lives. At the same time it emphasised the importance of not discouraging mothers from registering births altogether.

[445] http://www.dwp.gov.uk/publications/dwp/2008/birth_registration_wp.pdf
[446] http://www.dwp.gov.uk/welfarereform/noonewrittenoff/noonewrittenoff-complete.pdf

As things had stood, when a child was born, a father's name could only be entered on the birth certificate if the mother agreed; otherwise he could apply through the courts. In England about 7% of all births and 20% of illegitimate births were being registered without the father's name, some 50,000 children each year. This could cause the father considerable difficulties if he wished to be involved in his child's life because he did not have legal Parental Responsibility (PR). The Government believed that putting his name on the birth certificate would make a father more likely to pay maintenance; but it is also more likely that he would be able to play a more significant role in his child's upbringing, and less likely that he would be excluded.

The new arrangements mean an unmarried mother is no longer able to register the birth of a child without naming the father, and fathers are able to have their names added to the birth certificate without having to go to Court for a Parental Responsibility Order. If a named father does not wish to be on the certificate he needs to take a DNA test to prove he is not the father.

At the time of writing the Coalition Government intends to repeal this law and revert to the old situation, condemning more children to lifelong ignorance of who their fathers are.

17.2.7. Lessons from abroad

Labour gave the United States, Australia and New Zealand as examples of countries where rigid enforcement and draconian powers had been effective. A closer look shows that things are not quite so one-dimensional. These countries also make non-payment of child support a gender crime and criminalise fathers; such an approach rubs off on those fathers who do comply so that all are made to feel persecuted, and otherwise responsible parents become reluctant to cooperate.

In Australia, where 91% of liable parents are fathers, payers can pay as much as 62% of their net wage on child support, and between 3 and 4 fathers are driven to suicide each week.[447] Fierce enforcement has simply driven up unemployment so that amongst child support payers it is 3 times the rate in the general population. It costs the Australian taxpayer $2.80 to collect $1 of child support.[448]

In America there are no fewer than 60,000 child support enforcement agents (compared with 4,600 worldwide in the Drug Enforcement Agency) waging a war against fathers who are usually unemployed, impoverished, imprisoned, disabled or dead. Despite no academic research showing a significant non-payment problem and no public demand for the vast enforcement industry, estimates of arrearages range from $34 to $100 billion, based on surveys of custodial mothers, and hypothetical calculations by government agencies and private enforcement companies.

The reality is that 95% of employed fathers pay regularly and 81% pay in full and on time; despite this, between 1978 and 1998 the enforcement bureaucracy increased tenfold, and although, as in Britain, the intention was to be 'treasury-neutral', in 2008 it cost the

[447] Claims from Australian pressure group Men's Rights, http://www.mensrights.com.au/page20d.htm
[448] Figure from Report into the Australian Child Support Scheme by PIR Research Group

American taxpayer $5.9 billion[449] to collect the $5.05 billion of child support which was not paid willingly or on time. States receive 66% of operating costs and 90% of computer costs federally, even when resources are shared across states, and individual states can profit by $200 million a year.

As in the UK, generous levels of child support provide an incentive to divorce: no-fault divorce released wives from their marriage vows but did not provide them with a corresponding income, alimony was not attractive to women who wanted the illusion of financial independence; child support fills that gap, with children providing the bartering power. Child support underwrites unilateral divorce and, to a much greater extent than in the UK where the plan never worked, funds state governments whose solvency then depends upon fatherless children.

The mainstay of the system is the Family Court, dependably delivering a steady supply of absent and therefore liable fathers. The judges who do most to supply this terrible trade are duly lauded by the private profiteering child support system, thus one Judge Ross was honoured as 'Judge of the Year of America' by the National Reciprocal Family Support Enforcement Association in 1983, as 'Family Court Judge of the Nation' by the National Child Support Enforcement Association in 1989, and as co-winner of the Golden Heart Award by the Association for Children for Enforcement of Support in 1990. It is evident that a supposedly independent judiciary is in hock to pressure groups.

[449] Figure from US Department of Health and Human Services, Office of Child Support Enforcement, *2008 Preliminary Report*, http://www.acf.hhs.gov/programs/cse/pubs/2009/reports/preliminary_report_fy2008/

17.3. Coalition Reform

17.3.1. Evaluation

A 2006 report by the National Audit Office[450] found that although the CS2 reforms had cost £539 million they had not improved customer services or administrative efficiency: complaints, arrears and the backlog remained unacceptably high. A £321 million improvement plan launched in April 2006 also had minimal effect; £107 million of this went on the IT system.

A later NAO report in December 2009[451] following the CMEC reform showed that the backlog had been considerably reduced and new applications were being cleared more rapidly; accuracy had increased and complaints had reduced. The NAO stated, however, that it would have expected greater improvements in accuracy and compliance than the modest ones achieved. The IT problems which have always plagued the organisation had not been resolved and the number of cases calculated manually had increased from 19,000 in March 2006 to 75,000 in September 2009 (and now exceed 100,000). No further upgrades are planned for the computer system, which is scheduled to be replaced entirely in 2014; by then the total cost of the system will have been close to £1 billion.

[450] HC 1174, 2005-06, Child Support Agency – Implementation of the Child Support Reforms
[451] National Audit Office, Memorandum for the House of Commons Work and Pensions Committee: Performance of the Child Maintenance and Enforcement Commission, December 2009, http://www.nao.org.uk/publications/0910/child_maintenance_memorandum.aspx

Most clerical cases are those which have become 'stuck' in the computer system. Identification of these cases prior to 2006 only emerged when a complaint had been made, and the CSA was then responding only to complaints made through a parent's MP. Most stuck cases were therefore not being identified. The increase in clerical cases is due largely to improved identification. Many clerical cases were contracted out, and the average cost per case is £967 compared with £312 for a case dealt with by the IT system.[452]

More children are qualifying now for maintenance, and so more are benefiting, up from 623,000 in March 2003 to 868,700 in June 2011, but the percentage of qualifying children who benefit is fairly constant, despite the additional options for enforcement, and the cost of the Agency in the same period has risen from £465 million to £577 million (down from £605 million in 2009) – more than £100 million of this is just to calculate clerical cases. Arrears have increased from £3.5 billion to £3.8 billion, though 72% of this is regarded as uncollectible or of 'doubtful collection'. The debt collection agencies iQor and Eversheds were contracted to pursue 63,500 cases owing a total of £357 million with a target to collect £113 million; in the end only £26 million was recovered. The agencies were paid 13p for every £1 collected and the CSA decided this was not a cost-effective way of recovering debt and abandoned the use of external agencies; accordingly they increased debt collection staff from 572 to 3,187 while enforcement actions were up from 27,440 to 51,945 in 2009.

[452] Ibid.

With compliance (some maintenance paid) at 73% (against a target of 80%) it costs £1.97 to collect £1 of maintenance. We have to ask whether enforcement can ever be cost-effective.

17.3.2. Proposals

When it came to power in April 2010 the Coalition Government inherited from Labour an on-going review of the family justice system which it chose to preserve, merely adding a fifth member to the panel. The panel's initial remit did not include child support, but in January 2011 the Coalition belatedly decided to extend the remit to include this aspect of the system.

A theme emerged from the Coalition's early announcements about family justice. It was that parents who end up using the family justice system, or the child support system, or who have their children taken into care, are irresponsible parents, unable to parent properly, and cost the responsible taxpayer who parents his or her children in a state-approved manner an unacceptable amount of money. It was perfectly reasonable for the Government to try to reduce this cost; what was not acceptable is the underlying message. The Government wanted to pass off the failings of the system onto parents; it wanted to blame the huge cost on parents. It wanted to win public support for a policy which forced parents to make their own arrangements or give up. The parents and their problems then become invisible. The failings of the system become invisible. Job done.

This won't wash. The Government ignores the fact that a parent who wants to avoid being written out of his child's life, or wants to protect

a child from abuse, or wants to fight a bid by the local authority to take their child to meet adoption targets, has no responsible alternative but to go to Court. It ignores fathers' unwillingness to subsidise the breakdown of their own families by paying child support. It ignores the huge role played by the Government, by the tax and benefits system, and by the judiciary in promoting and exploiting family breakdown and fatherlessness. Most of the public recognise this. Most are affected by family breakdown or know someone who is. They are no longer taken in by these platitudes. They no longer have confidence in the family justice system, and they no longer respect the authority of the Family Courts.

We have had earlier reforms of the child support system in 1995, 2003 and 2006. Clearly they failed to achieve the improvements intended. This is because they all started from the same false assumptions, misconceptions and prejudice. The political understanding of the problem of child support is simply that it is not paid as it should be and that the reason for that is simply the refusal of feckless fathers to take responsibility for their children.

The real 'deadbeat dads' (to employ Ronald Reagan's vile expression) are those fathers like Tony Blair, Gordon Brown, David Cameron and Nick Clegg who will not face up to the reality of galloping family breakdown and soaring numbers of fatherless children. The truth is that deadbeat, irresponsible fathers are never going to be the solution; the challenge for the politicians is to reduce family breakdown and support the family. Nick Clegg has already demonstrated his refusal to do this, clinging to a policy which is correct politically but not factually.

Central to the Coalition's proposals are two themes; that parents should make their own arrangements, albeit with support from the State, and that child support should be integrated with other post-separation arrangements such as residence and contact, 'We want to enable and empower parents to have more responsibility in making their own informed choices to establish enduring post-separation arrangements.'

Where these proposals differ from earlier reforms – and where they deserve support – is that they take a holistic, integrated approach, employing 4 principles:

- The approach is family-centred; separating families will be supported to find collaborative solutions to the range of post-separation problems;
- State-provided services will encourage families to take responsibility for decisions in their children's best interests;
- The existing schemes will be replaced by a new statutory scheme to be introduced in phases to avoid former mistakes;
- There will be particular support for the vulnerable and victims of domestic violence.

The Green Paper seems more open-minded than previous offerings and to recognise the importance of using the contribution of locally-based voluntary and community sector organisations to help families towards reconciliation of child and financial disputes. Fundamentally it recognises that child support cannot be resolved in isolation: it must

be considered alongside other areas of contention. The aim is intervention at the earliest opportunity, in partnership with the mediation being advocated by the family Justice Review, to avoid the usual adversarial process and to enable families to understand their differences and to achieve child-centred solutions. This is all broadly in line with recommendations contained in the Fathers 4 Justice *Blueprint*, and recognises the evidence – much of which we present – that 'all issues' resolution results in more secure and longer lasting solutions.

Like the *Blueprint* the Green Paper advocates the use of 'hubs' to provide a 'one stop shop' access to a variety of services provided by both the local authority and the voluntary sector. The Paper talks of 'gateways' through which parents would access information about the maintenance options open to them and then the support and guidance to enable them to agree arrangements. This could be linked to the statutory system or be separate from it.

The Green Paper baulks at making mediation mandatory and the language is a little too touchy-feely – it even talks of 'reaching out' at one point. What the team behind the Paper must appreciate is that sometimes the family justice system needs to adopt a rather more robust approach to compliance with orders.

The new statutory system is being redesigned round the necessity of saving public money. Now that the old contract has expired, a new computer system can be designed. This will still be horrifically expensive, predicted to cost £155 million.

The most controversial aspect of the proposals is the cost to users, beginning with an application charge of £100; this will, the Green Paper claims, 'ensure that in all circumstances, applicants consider their maintenance choices fully', presumably on the basis that the more you pay for something the more you value it. The assumption seems to be that if you force parents to make their own arrangements it will reduce conflict; this in turn, it is claimed, will lead to higher levels of contact. Sir David Henshaw recognised that charging parents gives them an incentive to reach private decisions but both Henshaw and the authors of the Green Paper fail to appreciate that the ability to reach a private agreement is undermined if the statutory system makes an assessment far in excess of what couples would reasonably agree between themselves.

Both parents will also be charged a 'collection charge' to 'reinforce' this and 'ensure better value for money for the taxpayer', but not, obviously, for parents; non-resident parents will pay an additional 20% on top of their assessments unless they pay directly to the resident parent via 'maintenance direct', and resident parents will surrender up to 12% of what they receive unless payment is via maintenance direct, potentially giving the Government 32% of the total. The decision to use maintenance direct must initially be mutual, but future legislation will enable the NRP to make the decision unilaterally so as to avoid the additional charge, thus the surcharges will only apply if the NRP does not pay voluntarily. This is considered fair, as is the imposition of a charge on the PWC who benefits from a service provided to them.

Yet more charges will be levied on a parent who obliges the State to take enforcement action against him. At a time when families are most vulnerable and experiencing increased costs (running two

households, paying legal fees, etc) this will take money out of families and impoverish children. These ill-judged plans have been condemned equally by groups representing liable parents and those representing recipients.

In an additional move the Government has proposed abolishing CMEC (after less than 4 years of operation) and merging it with the Department for Work and Pensions. This is only an administrative change, but if it improves efficiency, increases accountability and reduces cost to the tax payer it can only be a good thing.

There is much in these proposals which should be welcomed; encouraging parents to make their own arrangements is a new and mature approach after the years of paternalistic intervention by Labour, and making the obvious – but long-avoided – link between child support and child contact is a breath of fresh air. In both areas, however, a statutory system which delivers one partner a significantly improved outcome over a mediated agreement offers an incentive for the advantaged partner to prefer State intervention. There is no sign in the Green Paper that its authors understand this, or appreciate why the existing systems are so prejudicial and reviled.

17.4. When the CSA Gets Involved

17.4.1. Requesting an assessment

Either parent can contact the CSA and request an assessment. They cannot accept a request where,

- the children or the PWC live abroad;
- the non-resident parent lives abroad and does not work for an employer based in the UK;
- there is a Court Order for maintenance in force made before April 2003;
- there is a Court Order for maintenance made after April 2003 but which has not yet been in force for 12 months;
- there is a written maintenance agreement which was made before 5th April 1993.

Where there is a Court Order or written maintenance agreement in force either party may apply to the Court where it was made in order to vary it.

17.4.2. Benefits claimants

Prior to 27th October 2008 if the resident parent was receiving Income Support or Jobseeker's Allowance, the CSA had to become involved. Under the new rules you can make a private agreement about maintenance. This can be made into a Court Order if you both agree, and if you are also asking the Court to make orders about other financial matters. Alternatively, you will be able to use CMEC, if it has jurisdiction.

If your child support has been arranged through the CSA hitherto you can now ask to be allowed to make your own agreement, though it is doubtful whether the resident parent will be keen on this. It is likely that they are receiving advice from their solicitor on how best to asset-strip you, in which case they will have been advised to continue using the CSA.

Where there is no CSA assessment the Court has jurisdiction over maintenance. Where there is an assessment then the Court does not have jurisdiction. So if the CSA doesn't get you the courts will.

The CSA has jurisdiction if all of the following apply to you:

- The child is the child (by birth or adoption) of both parents (this means that step-children cannot get support from their step-parents under the CSA).
- The person with care, the non-resident parent and the child all normally live in the UK (this includes people who are living abroad but are either working for UK employers or maintaining financial interests in the UK such as property or active bank accounts).
- The non-resident parent is not living in the same household as the child.
- The child is under 16 or over 16 and still in full-time secondary education.

If you work abroad the CSA have jurisdiction if you are working for a UK based company which is registered under the Companies Act 1985 and payments are made to you via a UK payroll. Otherwise the courts will have jurisdiction.

If you already have a Court Order for maintenance, the CSA will only be able to make an assessment if the Court discharges the order for maintenance.

You can also get an order from the court:

- for school fees;
- for the particular needs of a disabled child;
- for a 'top-up' order if the maintenance that the CSA can order reaches a ceiling – though this is set very high in the first place; or
- to vary an existing order.

The advantage of paying through the CSA rather than through the courts is that they use a formula to calculate payments, whereas the courts do not. The courts' power to take your money and hence your dignity from you is thus unlimited. With the CSA you are also able to ask that voluntary payments made to your children's other parent be taken into account. Furthermore if you are self-employed it becomes more difficult to collect money from you; where you are PAYE money can be drawn direct from your employer.

Don't fall into the trap of paying by Direct Debit, which is what they will try to bully you into doing; this gives them control and they can (and will) take what they like, and it can be a very slow and difficult process to change back if their assessments are incorrect. If you can, pay by standing order. This gives you control over the amount and a record of the money coming out of your account. Most banks will be able to trace the transaction to the destination account if there is ever any dispute. Alternatively you can pay directly into their account via a sort code and account number; reference it to your National Insurance Number. The CSA bank account details are: **Sort Code: 40-34-18; Account Number: 41775448**.

Note: that the CSA can only backdate a demand to the time they first asked the non-resident parent for information, not before it, but they will try it on.

17.4.3. Making a court claim

If the CSA will not get involved or does not have jurisdiction – for example when a liable parent lives or works abroad, the PWC can make a claim under Schedule 1 of the Children Act 1989,

> *(1) On an application made by a parent or guardian of a child, or by any person in whose favour a Residence Order is in force with respect to a child, the Court may—*
>
> *(a) in the case of an application to the High Court or a county court, make one or more of the orders mentioned in sub-paragraph (2);*
>
> *(b) in the case of an application to a magistrates' court, make one or both of the orders mentioned in paragraphs (a) and (c) of that sub-paragraph.*

These orders are (a) to make a periodical payment, (b) to secure a periodical payment, (c) to pay a lump sum, (d) to make a settlement of property and (e) to transfer property. These payments, settlements and transfers may be made either to the applicant for the child's benefit or to the child himself.

Claims for financial support can also be made under Section 22 of the Matrimonial Causes Act 1973.

17.4.4. Step parents

You are not automatically financially responsible for your step-children, but, if you marry or enter into a civil partnership with one of their parents, you could become financially responsible for them if you treat them as if they were your own children. If you are not married to or in a civil partnership with your partner, you will have no financial responsibility for their children. Even if they live with you, the parent they no longer live with will still have to pay child support.

In practice you might choose to make a financial contribution to your step-children's upbringing – even if you and your partner separate. It is helpful to set this out in a 'Living Together Agreement'; this is not just about what you will do if you split up – like a pre-nuptial agreement – it also covers how you will live together day-to-day: who pays for what, how you divide up bills, food costs, etc. If it also covers what you will do should you split up it can actually make your relationship more secure, and can prevent a great deal of acrimony if you do separate. There is more information on Living Together Agreements on the internet. You could also use the Living Together Agreement to spell out how any child support paid by the other parent should be used. This can be particularly useful if you are no longer on good terms, so that they can be sure that their money is being spent on the children.

17.5. Problems with Child Support

17.5.1. Selling contact for CS

An important paper[453] from by John Ermisch of the University of Essex demonstrated that child support and contact are inextricably linked. In the light of the 2006 Government White Paper on Child Support, he pointed out that if reform 'is successful in improving enforcement, then it is likely to reduce the frequency of fathers' contact with their children for many fathers.' This should have been profoundly worrying for any politician who thought fathers should take responsibility for their children. The new powers given to the CSA make it far more difficult to avoid payment, and that inexorably leads to a reduction in contact. The report continued,

> *These connections between policies affecting child support payments and the frequency of fathers' contact with their children have been overlooked because of an inadequate theoretical foundation for the analysis of child support and contact.*

Once again policy was based on supposition and prejudice and not upon strong evidence and research. In analyses by Del Boca and Ribero (1998, 2001, 2003), mothers 'trade' contact time between non-resident fathers and their children for child support payments. The less contact time, the higher the payments.

[453] Ermisch, John, *Child Support and Non-resident Fathers' Contact with their Children*, ISER Working Paper 2006-14. Colchester: University of Essex, October 2006, http://www.irc.essex.ac.uk/pubs/workpaps/pdf/2006-14.pdf

If your children's other parent is on benefits they will have been advised by their solicitor that reducing your contact with your children or preventing it entirely will maximise the child support to which they are entitled.

Human nature being what it is, NRPs who are denied contact withhold child support and PWCs who don't receive child support deny contact. Neither response is legally defensible but they nonetheless take place. Although the connection between them is pretty obvious, the law currently regards contact and child support as two entirely different issues and they are administered by different government agencies and by different legislation.

The level of support you pay is either agreed between you or set by the CSA. If you are not paying the child support to which your children's other parent believes they are entitled they must pursue payment through the CSA or through the courts – the CSA is required to do this on their behalf but do not always. Contact is granted to the child, not to you as the non-resident parent; preventing contact is thus further punishment of the child, not of you.

As the law stands if your children's other parent denies you contact you must still pay maintenance.

The child support you pay used to be based on the amount of time your child spent with you. If you had a Contact Order from the Court and it was followed, the child support you paid depended on the amount of Contact Ordered by the Court. If your children's other parent started to obstruct contact or prevent it entirely, your assessment for child support increased accordingly. The CSA ignored the Contact Order and based the assessment on the actual contact taking place.

When making an assessment the CSA will accept whatever the Person with Care (PWC) tells them with regard to how many nights a child stays with them and how many nights the child stays with the Non-Resident Parent (NRP); they tend to disregard any Contact Order which may state otherwise. The reasons they give for this are:

- A Contact Order may be out of date;
- A Contact Order may not be followed.

This tells you (yet again) that a Contact Order is a worthless piece of paper, and that child support assessment adopts a process which blissfully ignores Section 8 orders. This is the position approved by the courts, but it has the unintended consequence of giving resident parents a financial incentive not to follow Contact Orders.

There is evidence now that this approach is changing, following pressure on the CSA, and that case workers will base assessments on Contact Orders if provided with the details. No change in legislation has led to this reform, suggesting the original approach never had any foundation.

17.5.2. Shared parenting & CS

As is clear from the foregoing, even in situations of 50/50 shared parenting one parent must still be designated the person with care (PWC) and one the non-resident parent (NRP). The NRP must continue paying the PWC a proportion of income according to the formula; the sum paid only reduces to zero when the NRP is doing *all* the child-care and the PWC is doing *none* (by which point, of course, the NRP should be considered the PWC).

There is, however, a little used, almost forgotten, provision in the Child Support Act 1991. Through Section 8(10), even when a maintenance assessment is in force, the Court still has jurisdiction in respect of an application for maintenance made by the non-resident parent, i.e. the one paying the maintenance,

> *This section shall not prevent a court from exercising any power which it has to make a maintenance order in relation to a child if the order is made against a person with care of the child.*

Thus it is open to NRPs in shared care situations unreasonably or unfairly burdened by a child support assessment to make a parallel court application for maintenance against the PWC. An example: Dad and Mum earn highly but exactly the same; Dad has the children 49.9% of the time, Mum for 50.1% of the time. Dad is assessed to pay, say, £1,000 per month which is then cut by the 3/7 allowed for time with Dad in excess of 156 nights per year, making a net transfer of £571 per month from Dad to Mum, when on any fair standard there should be no transfer either way since there is truly equal care with equal incomes. It is then open to Dad to apply to the Court for maintenance from Mum of the sum of £570 per month. It would make an interesting test case: there appear to be no reported cases on s.8(10).

The example given is contrived and simplistic, but there is no reason why s.8(10) should not be invoked in many shared care situations e.g. a 30-70% division, especially as the parent receiving under the CSA will have other unfair advantages such as being able to claim 100% of Child Benefit and Tax Credits (which under the present law cannot be apportioned), while the maintenance payer cannot obtain any of these advantages notwithstanding his substantial responsibility to his children while they are in his care.

17.5.3. Sharing child tax credits

The normal arrangements for the payment of dependents' allowances is that the parent in receipt of Child Benefit (required by the legislation to be the mother) or the parent with whom the child usually lives receives all other benefits.

On 21st December 2004 and after a 7 year legal battle Eugen Hockenjos obtained a ruling[454] that he could receive the full amount of Dependent Children's Allowance in respect of his two daughters, Heidi and Alisha.

[454] Hockenjos v Secretary of State for Work & Pensions [2004] EWCA Civ 1749: Ward, Arden, Scott Baker LJJ, http://www.bailii.org/ew/cases/EWCA/Civ/2004/1749.html

The Court of Appeal, acknowledging the increasing awareness of the role of fathers in the care of children held that the link between Child Benefit and receipt of other benefits was discriminatory, as was the regulation that only one parent could be responsible for a child. Hockenjos argued his case under Directive 79/7/EEC of the European Community legislation, which states that there can be no discrimination, either directly or indirectly, in regard to statutory schemes which provide protection against unemployment.

Their lordships rejected the Secretary of State's argument that this sex discrimination could be justified; the Court commented that to allow a father nothing for the maintenance of the child when he shares care virtually equally is so unfair that no reasonable secretary of state could countenance it. Lord Justice Ward observed,

> *174. To be forced to treat only one* [parent] *as responsible where there is a shared residence order in force and in operation is grotesque. It is degrading to fathers who actually - and lovingly - tend to their children. A law so framed is so far removed from reality that it brings the law into disrepute and justifiably fuels the passions of protesting fathers.*

The court recommended that the Government redraft the legislation to incorporate a greater degree of fairness; instead, the Government took the case to the House of Lords. The Dependent Children's Allowance has now been replaced by Child Tax Credits (since April 2004) in which the test for eligibility is not who is in receipt of Child Benefit but with whom the child normally lives. The continuing unfair distribution of Child Tax Credits cannot be challenged using this ruling, nor does Directive 79/7 apply to family benefits. Eugen Hockenjos' superhuman efforts were thus circumvented by a Government determined to continue 'grotesque' discrimination against fathers, and it is unlikely that the discrimination can be challenged on human rights grounds, following Kevin Barber's failure to achieve this with regard to Child Benefit.

17.5.4. Reducing earnings

The CSA is wise to the fact that NRPs often take a voluntary cut in earnings in order to pay less child support, and is reluctant to take such a cut into account. It is, however, obliged to deduct from your pay according to the regulations, and you can guarantee it will take more if your earnings increase.

If your earnings drop for any reason you must contact the CSA immediately to tell it; if you are paying as a result of a court Maintenance Order you must contact the Court.

If you think the assessment is wrong you must appeal. According to their regulations they can use a two-year-old tax return to calculate your income, and only need to recalculate if your earnings change by 25%. This will leave some NRPs seriously out of pocket. Argue that the CSA must base assessments on actual income and not on a notional figure based on an out-of-date tax return.

Similarly if you are paying for a mortgage and for any other debts the CSA must take these payments into account in its assessment. If you are paying arrears on these debts you must request a rapid reassessment of your case on the basis that you are paying the

mortgage and arrears which both you and your children's other parent accrued as you are **jointly** liable for these debts which will then have to be deducted from your maintenance assessment.

In January 2004 *The Mail On Sunday* carried a story about a bus driver who was being stung by the CSA until he lowered his weekly working hours. He was paying his children's other parent according to the old CSA system, CS. His claim for Tax Credit was increased but his CSA payments were reduced dramatically from £130 per week to £34 per week and his overall take-home pay increased by £66 per week.

Some NRPs have negotiated pay cuts of up to 35% with their employers (it shouldn't be too difficult!) in order to get CSA payments reduced. They actually come out with more disposable income after the cuts (or they wouldn't do it!), so it's well worth considering.

You can work out the optimum figures by putting test amounts into the **CSA** and **CMEC** calculators available on the internet.

Working fewer hours also has the advantages of giving you more time with your children, leaving more time to work on your case, to support campaign organisations, and to prepare information packs for the children to receive when they are older if you are not getting contact. You might even find that if you were previously slightly above the public funding threshold, you now become eligible. Although we obviously advise against using a solicitor.

Other ways to restructure your financial affairs might include reviewing your pension arrangements (50% of contributions get taken into account on the 'old' CS system, 100% of contributions on the 'new' CS2 system) and other subtleties. For example, should you decide to re-mortgage your home, don't go for the lowest monthly payments possible and do not defer interest – and consider a grand or two cash-back option (providing it's not too big to attract the attention of the CSA or the Legal Services Commission if you become legally aided).

17.5.5. Maintenance orders

The CSA has strict rules on how much money they can take from you; there are no such restrictions affecting the courts. You are often better off, therefore, with an assessment from the CSA. Unfortunately the CSA is much more likely to respond to a request for involvement from your children's other parent than from you; although in theory they are supposed to consider it, in practice it is reluctant to take on more work if it can avoid it. If your children's other parent is in receipt of prescribed benefits she must make this request, if it has not already happened automatically. Your children's other parent will be advised by her solicitor that she can get more money from you through the courts.

The first thing you should do is apply to overturn the order in the Magistrates' Court. Unfortunately magistrates are not experts on child support and follow the standard 'every dad is a deadbeat' dogma: they will not be sympathetic. Don't apply in the Magistrates' Court again; once judged in the Magistrates' Court the matter is *res judicata* (i.e. a matter already judged and which cannot be judged again) unless you can demonstrate a change in circumstances.

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Appeal the decision in the High Court, and in the meantime pay the rate you would normally pay under the CSA. Appeals to have Maintenance Orders reduced to the level of normal CSA rates are usually successful. Be aware that if you make what the Court considers to be too many applications they will be inclined to slap a Section 91 Order on you preventing further applications. Before making the application move any capital assets you have in case of enforcement proceedings against you.

While a variation application is pending there should be a stay of execution of enforcement by bailiffs, etc. That will not help you if the warrant had already been issued before the variation application. This rule does NOT prevent an application for a stay of execution being made.

17.5.6. Financial provision orders

While the CSA can only demand regular contributions from you based on income, the Court can order the payment of lump sums from your capital.

Under **Section 15** of the Children Act 1989 the Court has jurisdiction to make one of a number of orders under **Schedule 1** of the Act on application by a parent, guardian or anyone with a residence order in respect of the child:

- An order requiring one or both parents to make or secure to the applicant or the child periodical payments or a lump sum;
- An order requiring a settlement of property to be made for the child's benefit;
- An order requiring either or both parents to transfer property to the applicant or to the child.

In Phillips v Peace [1996] 2 FLR 230 although the CSA had assessed a father as having no income and therefore no liability for child support, the Court made a Schedule 1 order for the father to provide the mother with a house for the child's benefit.

In 2005 the same mother returned to court (Phillips v Peace [2005] 2 FLR 1212) to argue that she, the child and another child by an unknown father had now outgrown the house provided in 1996 and required further capital provision (aren't some people wonderful?). The Court cited the prohibition in Schedule 1 at 1(5)(b) on the making of more than one order in respect of the same child, and held that there was no power to review or vary a property order (Schedule 1 at 1(4) allows variation only of an order for periodic payments).

In **W v J (Child: Variation of Financial Provision) [2003] EWHC 2657 (Fam)** a mother shamelessly sought an increase in financial provision to provide an element for legal fees for future litigation over the child (which presumably she was planning). The Court ruled that Schedule 1 provided no jurisdiction for a payment which would be for the benefit of the parent and not of the child.

17.5.7. Segal orders

A Segal Order is an order for spousal maintenance. It is made by a court under the **Matrimonial Causes Act 1973** in order to ensure that a resident parent is not left without financial means following divorce and before the CSA has made its assessment (which can legitimately take 26 weeks, and in reality take months or in some cases years). It does not replace the CSA assessment, though the CSA will have to take it into account when it makes its calculation. It is defined by Thorpe LJ in Dorney-Kingdom v Dorney-Kingdom [2000] 3 FCR 20 at paragraph 24:

> *A practice has grown up, finding its origins before District Judge Segal in the Principal Registry, to make an order for spousal maintenance under s.23(1)(a) of the Matrimonial Causes Act 1973 that incorporates some of the costs of supporting the children as part of a global order. When a Segal order is made an important ingredient is that the overall sum will reduce pro tanto from the date upon which the Child Support Agency brings in an assessment* [i.e. what has been paid will be deducted from the final assessment]. *The utility of the Segal order is obvious, since in many cases the determination of the ancillary relief claims will come at a time when the Child Support Agency has yet to complete its assessment of liability. It is therefore very convenient for a district judge to have a form of order which will carry the parent with primary care over that interim pending the Agency's determination.*

17.5.8. Connell orders

A Connell Order is similar to a Segal Order. It is another form of maintenance order in which the Court first determines what the husband (usually) must pay globally for the maintenance of his wife and children. The Court then orders him to pay that amount, less whatever the CSA calculates.

It ensures that a husband is not made worse off if his wife goes to the CSA, and she is no better off, because if the CSA takes more, the husband then pays less under the Connell Order so that the total remains constant.

17.5.9. Going to court

As we saw above, the CSA has various options they can use against you if in their opinion you have not paid the child support due. If you are breaking the rules – however unjust they may be – there is no defence which will help you avoid penalty. As a number of NRPs have found out, this can be severe. Loss of your driving licence will quite likely result in the loss of your job (and possibly therefore your home) and render you unable to stay in contact with your children. Prison can have the same effect. You can delay legal action to some extent by offering to pay part of your debt.

The CSA uses committal and banning orders as a threat to force payment; it does not expect you to hold out. It is attempting to crack down on 'deadbeat dads' and there is pressure on it to deliver; if you

are one of the unlucky 10% of defaulters it decides to pursue it is unlikely that you will win over the magistrates with your sob stories or explanation of how unjust the system is.

Note: that going to prison will **not** discharge the debt.

Note: if the CSA makes a Deduction from Earnings Order against you, you will only be able to get it reversed by making an application to the courts.

17.5.10. Debt collection

In 2006 the CSA contracted two private debt-collection agencies, iQuor and Eversheds, to recover some of the outstanding child support debts. In the US and elsewhere this has become a very lucrative industry; one US company, IntelliRisk Management Corp (IRMC), has aggressively bought up child support debt collection agencies in the US and abroad and is now the world's third largest such agency. As noted above, however, the experiment in the UK was a failure and the CSA has abandoned private debt collectors in favour of carrying out its own debt collection.

Debt collection is governed by regulations to which the CSA should be subject. The Office of Fair Trading provides guidance[455] on how debt collection should be conducted, and includes the following as bad practice,

- Putting pressure on debtors or third parties;
- Contacting debtors at unreasonable times and at unreasonable intervals;
- Pressurising debtors to pay in full, in unreasonably large instalments, or to increase payments when they are unable to do so;
- Making threatening statements or gestures or taking actions which suggest harm to debtors;
- Ignoring and/or disregarding claims that debts have been settled or are disputed and continuing to make unjustified demands for payment;
- Continuing with a visit when it becomes apparent that the debtor is distressed or otherwise vulnerable;
- Entering a property uninvited;
- Not leaving a property when asked to;
- Visiting debtors, unless requested, at inappropriate locations such as work or hospital.

If the CSA harasses you it will be in breach of the Protection from Harassment Act 1997; if it harasses you by telephone it will be in breach of the Wireless Telegraphy Act 1949. Seek legal advice,

[455] Office of Fair Trading, *Debt collection guidance*, July 2003 (updated December 2006), http://www.oft.gov.uk/shared_oft/business_leaflets/consumer_credit/oft664.pdf

contact the Citizens Advice Bureau or contact your MP. **Never give the CSA your phone number**.

17.5.11. Emigration

The CSA does not have jurisdiction beyond the UK, but if you emigrate there are international agreements with other countries under the REMO scheme which will enable it to pursue you for debts, particularly if the sums owed are large (thousands of pounds).

REMO (Reciprocal Enforcement of Maintenance Orders) is the process by which maintenance orders issued by UK courts in favour of UK residents can be registered and enforced by courts or other authorities in other countries against non-resident parents residing there.

This is a reciprocal arrangement governed by international conventions, which means that foreign maintenance orders in favour of PWCs abroad can likewise be registered and enforced by UK courts against UK residents. The precise nature and degree of reciprocity available between the UK and another jurisdiction depends on the convention or agreement to which the other country is a signatory.

Under the REMO scheme there needs to be a Court Order for maintenance rather than simply a CSA assessment. It is easier to pursue you for payment if you are still a UK tax payer, or if you are working for a UK company and are paid from a UK bank account; if you are not it will be more difficult for them, particularly if you live outside the EU.

If there is no existing maintenance order, a claimant can go to their local Magistrates' Court and apply for one. The court staff will assist with this and there is no need to involve a solicitor.

Some child support agencies, such as the Australian system, will accept direct applications from UK resident PWCs in respect of NRPs resident in Australia. Such is the international prejudice against 'deadbeat dads' that it is likely schemes like this will proliferate.

More information is still available in archived form on the **DCA website**; application forms are available on the **Ministry of Justice website**. The best resource now is the **CSA website**. The procedure for reciprocal enforcement is provided by **Part 34** of the Family Procedure Rules 2010.

If your children's other parent emigrates with your child the chances are that contact will be severely curtailed and you will have to pay child support. Fight such a move as hard as you can to retain residence and give your children's other parent contact; these cases are rarely fought properly, but if a parent wishes to emigrate it is quite wrong that they should automatically be able to take their children with them. Once your children's other parent is settled in their new home the UK courts no longer have jurisdiction so Contact Orders made here will be worthless, and you may need to spend considerable time in the new country, and money on lawyers, to re-establish contact.

Is it not absolutely scandalous that there is a system by which child support may be enforced, but not an equivalent one to enforce contact in leave to remove cases?

If, however, the other parent is only on a limited visa *or* if it can be shown that they have sufficient remaining links to deem them as being habitually resident in the UK the UK courts will retain jurisdiction. This will usually be if they have property here, or active bank accounts, etc. Some countries, such as Australia, only allow immigration if the immigrant is able to support themselves financially for a certain period, or if they have a sponsor who will do so. Your children's other parent should not therefore be claiming benefits, but the host country will not tell you if they are, so you are advised to find out what sort of visa they have before they leave.

If you do agree to your children's other parent emigrating, do so by means of a consent order, and make sure that there is a clause with regard to child support. If your children's other parent then goes to the child support agency in the new country to increase payments, they are in breach of the order and you can take them back to court in the UK. They will then have to attend in person or send representation, either of which will be costly. You can then offer to drop your case if they drop theirs.

If the CSA itself has no jurisdiction, maintenance has to be dealt with through REMO. If your case comes to Court you need to argue that the additional costs of contact (flights, hotels, etc) exceed your liability for maintenance. REMO will not overturn an existing order.

Sometimes the child support assessment will be for a much higher amount than the equivalent UK assessment. Presenting the foreign agency with a UK Court Order will not help because the UK court has no jurisdiction. The foreign agency will demand your employment and financial details; if you do not comply they will base your assessment on the average UK national wage (about £25,000); whether or not this is in your interest will depend on your income. Again the 'deadbeat' prejudice is against you and you will need to resolve this through REMO and if necessary through the courts. The advantage to you of using REMO is that you can plead your case in a UK court and do not need to travel to the new country. Beware, however, of visiting the country if you are in debt to their child support system: you may be arrested on entry. If the UK courts through REMO decide not to take money off you, the new country will not be able to arrest you or bar you from entry.

17.5.12. Making a complaint

Like the CAFCASS complaints procedure, the Child Support Agency's complaints procedure is notoriously inadequate. The complaints procedure on their old website used to be hidden under the letter H in the alphabetical listing, but has been moved on the current one. To find complaints: on the home page click on *Your Case* at the top of the page and then click on *Complaints* at the bottom of the list on the left hand side of the screen.

Download the CSA leaflets on making complaints:

1. **CSL308**: *How do I complain about the service I get from the Child Support Agency?*

2. **CSL307**: *How can I appeal against a child maintenance decision?*

You can also get these from your local office, or from their National Help Line 08457 133 133.

Complaints are handled on a regional basis and you must contact the office which deals with your case, their address and phone number will be on the letters they send you, and are also on their website.

The CSA are obliged to:

1. Acknowledge your complaint by letter, or phone if you prefer (though we advise against giving them your number), within 2 working days of receiving it;

2. Send you a full reply within 10 working days. If they cannot send you a full reply, they must send you an initial reply within 10 working days to tell you when you can expect a full reply.

Complaints must follow a strict process of escalation. First speak to the person dealing with your case, if their response is unsatisfactory, ask to speak to their manager.

The next step is to contact the Complaint Resolution Team at the same office.

Next, contact the Area Director at the same office.

Next, contact the Chief Executive of the CSA: The Office of the Chief Executive, Quay House, The Waterfront, Brierley Hill, West Midlands, DY5 1XZ.

If you are still not satisfied you can write to the Independent Case Examiner (ICE), John Hanlon; he is not a part of the CSA and his service is free. You must contact him within 6 months of your reply from the Chief Executive. Write to: The Independent Case Examiner, PO Box 155, Chester, CH99 9SA. Or contact him through his website at **www.ind-case-exam.org.uk**; or phone his office on 0845 606 0777.

The ICE can consider complaints about the way a case was handled or about the actions (or inactions) of the agencies and bodies within its jurisdiction, including,

- Delays;
- Mistakes;
- Rudeness by staff.

One of the main problem areas identified by the ICE is the Child Support Agency's complaint-handling process, which some parents find inaccessible and unclear. The ICE points out that the Child Support Agency is working to improve its complaints handling.
The complaint must be brought to the ICE within six months of the Agency's final response.

The ICE cannot deal with specific complaints about the level of child maintenance. These complaints must go first to the Child Support Agency, and then on to an independent appeals service.

Complainants must exhaust the CSA complaints procedure before they can approach ICE. Once a client complains to the ICE, a check will be

made of whether this has happened. If it has, the ICE will advise that the case has been accepted and issue a leaflet that explains how matters will be taken forward. If not, the ICE will ask the CSA to respond to the complaint directly. If the complaint is then not resolved within six weeks, or if the complainant does not receive a response from the CSA in that time, they can ask the ICE to investigate without further ado.

You may decide you want to contact your Member of Parliament, who can ask the Parliamentary Commissioner for Administration, sometimes known as the Ombudsman, to look into your complaint. You can get more information about the Parliamentary Commissioner from the leaflet *How to complain to the Ombudsman*. You can get this leaflet from:

Office of the Parliamentary Commissioner for Administration,
Millbank Tower,
Millbank,
London,
SW1P 4QP

Or by visiting their (hideous) website at **www.ombudsman.org.uk**; or by phoning them on 0845 015 4033.

17.5.13. Alternative numbers

If you need to call the CSA they will typically give you 0844/0845 numbers to call; these can be expensive especially when using a mobile phone. Avoid the additional cost by ringing cheaper local and national numbers instead: you will reach the same office but at a cheaper rate.

OFFICE	FULL RATE NO:	LOW RATE NO:
National Helpline General enquiries	0845 713 3133 Fax: 0151 2431906	0151 243 1901
Old system enquiries:	0845 713 7000	0151 243 1901
Appeals:	0845 610 0769	01253 667 700
Complaints Review Team Washington:	0845 609 0042	0191 224 7790
Birkenhead:	0845 609 0082	0151 649 0861
Belfast:	0845 713 2000	028 9043 8596 or 028 9089 6666
Bolton:	0845 050 8489	01925 434 573
Dudley:	0845 713 1000	01384 488488 or 01384 480188
Falkirk:	0845 713 6000	01324 625 758
Hastings:	0845 713 4000	01424 465 095
Plymouth:	0845 713 7000	01752 726 000 or 01752 695111

17.6. Cases

Phillips v Peace [1996] 2 FLR 230
Dorney-Kingdom v Dorney-Kingdom [2000] 3 FCR 20
Hockenjos v Secretary of State for Social Security [2001] EWCA Civ 624

W v J (Child: Variation of Financial Provision) [2003] EWHC 2657 (Fam)
Hockenjos v Secretary of State for Social Security [2004] EWCA Civ 1749
Phillips v Peace [2005] 2 FLR 1212

CHAPTER 18: COMMITTAL

> *I simply refuse to accept that there is any equivalence – legal, moral, parental, or in any other respect – between a father who is "entrenched and rigid" in his desire to have the contact which everyone other than the mother thinks he should have with his daughter and a mother who is "entrenched and rigid" in her opposition to that contact.*

Mr Justice Munby[456]

18.1. The Last Resort

18.1.1. General observations

Committal to prison is the ultimate sanction available under UK law. This section will deal with how you go about having a former partner committed, and what to do if you are that partner.

We shall look both at committal for breach of Contact Orders – most often sought by fathers – and at committal for breach of injunctive orders – most often sought by mothers.

Committal arises in family proceedings as the penalty for Contempt of Court following repeated refusal to obey an order or disclosing confidential information. The Court may consider imposing a fine or – its ultimate sanction – committal.

If the breach of a Court Order is to result in committal certain criteria must be satisfied:

- First, there must first be a 'penal notice' attached to the original order. Penal notices can only be attached to 'injunctive' orders, that is, an order which requires you to do or not to do something.

[456] Re D (Intractable Contact Dispute: Publicity) [2004] EWHC 727 (Fam)

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- An order is only enforceable if it has been personally served on the respondent. If the respondent is deliberately avoiding service the order does not have to be served personally and can be put through his letterbox.

Re A (A Child) [2008] EWCA Civ 1138 established three further principles:

1. The contempt must arise through breach of the order and not from the event (abduction in Re A) which prompted the order;

2. The applicant must prove to the 'beyond reasonable doubt' criminal standard that the respondent knew about the order and that what they did breached it; and

3. the disobedience must be shown to be deliberate.

Lord Justice Wall further clarified in **Re S-C (Contempt) [2010] EWCA Civ 21** that the order which it is alleged the respondent has breached must be clear and unambiguous so that the respondent knows 'with complete precision what it is that they are required to do or abstain from doing'.

This last criterion was employed by Lord Justice Munby in **Re L-W (Children) [2010] EWCA Civ 1253**, a case we have already cited (at **5.4.1**) and which set the limits on the obligations of a parent subject to a contact order. The applicant must demonstrate that the letter of the order has been breached; it is not enough to show that its spirit has been.

It is also established, for example in Nicholls v Nicholls [1997] 1 FLR 649, that breach must have a significant or potential impact on the justice of the case.

An application for committal must show what provision in the order has been breached and in what form it has been breached. The application must be accompanied by an **affidavit** setting out these details.

Breach of the order does not automatically result in committal: the party who applied for the order must usually make a further application to the Court for committal. Alternatively, if there is a power of arrest attached to the order, the applicant can have the respondent arrested and brought to Court. Hearings should be held in open court.

18.1.2. Breach of court orders

A committal is the last resort, used by a court only when no other option is appropriate; see, inter alia, Danchevsky v Danchevsky [1975] Fam 17, Ansah v Ansah [1977] Fam 38, A v N (Committal: Refusal of Contact) [1997] 1 FLR 533 (CA) and **Re V (Children) [2008] EWCA Civ 635**; but there is no principle of 'first free breach', and immediate committal may be appropriate for serious breach; see Wilson v Webster [1988] 1 FLR 1097. The basic court approach to committal in contact cases was established in Thomason v Thomason [1985] FLR 214 where Bush J gave his opinion,

> *The object of the exercise is to enforce the breached order for access in the sense of getting it working, or putting something more workable in its place. This is rarely achieved by sending a parent to prison or by fining them.*

In the context of the Family Courts 'something more workable' has always been code for an order for less access, and the steady erosion of parent-child relationships. It was hoped that the introduction of the Children and Adoption Act 2006 would change that.

The reality for non-resident parents and their children is that the courts have never enforced contact with any enthusiasm and we should be wary of assuming that this will change with the new sanctions available to them. The fact that the failure to enforce contact is a clear breach of Article 8 of the European Convention on Human Rights doesn't seem to have concerned judges; cases taken to the European Court of Human Rights such as Hansen v Turkey [2004] 1 FLR 142, Glaser v UK [2000] 3 FCR 193; [2000] 1 FCR 153 ECHR or Zwadaka v Poland [2005] 2 FLR 897 established that states have a duty to allow access, to engage social services or child psychologists and to apply reasonable coercive measures to custodial parents who consistently refuse to comply with Court Orders, as long as it is in the best interests of the child. The failure of parents to cooperate does not absolve states of their responsibilities under Article 8, yet the courts remain extraordinarily reluctant to take even the most obvious measures, and when she was President Elizabeth Butler-Sloss resisted these rulings.

For example, in **Re D [2004] EWHC 727 (Fam)** a father applied for contact; there were no fewer than 43 hearings before 16 judges producing 950 pages of evidence. The mother consistently obstructed contact, and the contact ordered, but never effectively enforced, dwindled away to nothing. The father had secured a penal notice added to his order, a year later a suspended sentence had been imposed, and after another year the mother had at long last been committed. Judgement, by Mr Justice Munby, was given a full two years later. The mother had made numerous false allegations against the father and all proved groundless. Even when the father lost his temper, Munby excused him as a man 'goaded beyond endurance'. Finally the father applied out of utter hopelessness to withdraw his application for contact, Munby said,

> *In this case it is mother who is overwhelmingly responsible for the predicament in which* [D] *and her father now find themselves. I simply refuse to accept that there is any equivalence – legal, moral, parental, or in any other respect – between a father who is 'entrenched and rigid' in his desire to have the contact which everyone other than the mother thinks he should have with his daughter and a mother who is 'entrenched and rigid' in her opposition to that contact.*

In many such cases judges have condemned mothers for flouting orders but have completely failed to do anything about it;[457] this is how the judges excuse themselves,[458]

[457](For example, F v M [2004] EWHC 727, http://www.hmcourts-service.gov.uk/judgmentsfiles/j2466/f-v-m.htm; A v A[2004] EWHC 142=20 (FAM); C v C[2004] EWCA Civ 512)

[458] Comments from two unnamed judges quoted in Joan Hunt and Alison Macleod, *Outcome of applications to court for Contact Orders after parental separation or divorce*, Ministry of Justice, September 2008

> *How can you send to prison a mother with several children? It goes through stages, we are encouraged to be bold enough to send mothers to prison. But on a practical basis it doesn't work. And you're dealing with these mothers who will tell the kids as they're coming out of the front door with their bag, 'I'm going to court, your father is getting me sent to prison'. And how that is going to assist the relationship?*
>
> *Once you've done that you've spent your powder as a court, really and in a way you've surrendered your jurisdiction to the mother. You've punished her but you haven't achieved anything; you've given her the power to control the case. I think it's a defeatist thing to do, quite honestly.*

The irony is that courts imprisoned more than 50 mothers between 2003 and 2008 for condoning truancy[459] but not for the graver crime of preventing paternal contact. We cannot give comparable figures because – according to a written answer given by Harriet Harman to a House of Commons question – they are not recorded.[460] No information is recorded either to indicate the effect of committal on contact or on children, so the belief that it is ineffective or not in a child's best interests is not necessarily supported.

Lord Justice Ormerod summarised the judicial view:[461]

> *There is no doubt and it should be clearly understood* [ ] *throughout the legal profession that an application to commit for breach of orders relating to access (and I limit my comments to breaches of orders relating to access) are inevitably futile and should not be made. The damage which they cause is appalling.*

Re K (Children: Committal Proceedings) [2003] 2 FCR 336 established that imprisonment would infringe the human rights of a mother and her child and that committal must be justified under Article 8(2) (the right to freedom from state interference in one's private life). Other remedies such as further Contact Orders, fines, family therapy and transfer of residence must be tried first (**Re M (Contact Order: Committal) [2004] EWCA Civ 1790**).

The case of A v N (Committal: Refusal of Contact) [1997] 1 FLR 533 gave some commentators hope that there would be a greater acceptance of committal orders: a mother consistently flouted orders for contact, the judge imposed a six week sentence suspended for six months, the mother again failed to comply and the judge imposed the sentence. Rejecting the mother's appeal Lord Justice Wall said that the child's welfare was *not* the paramount consideration,

> *The question which is before the Court is whether there should be a committal for breach of orders of the Court and in that inquiry the upbringing of the child is not a paramount consideration. It is obviously a material consideration…* [The county court judge] *was fully mindful of the distressing consequence of imprisonment on the child and indeed the other child of the mother, but he balanced against that the*

[459] Since 2001 when sanctions were introduced there have been 32,567 convictions, but levels have continued to rise: by 44% since 1997. In 2008 there were 9,506 prosecutions, 7,291 convictions and 11 committals; between 2003 and 2006 16 fathers were jailed and 55 mothers. 230,000 children were classed as persistent absentees.

[460] Harriet Harman, Hansard, 4 July 2006, http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060704/text/60704w1420.htm#06070491000037

[461] Churchard v Churchard [1984] FLR 635

importance of this child knowing her father as she grows up and the long-term damage she will suffer.

Wall continued that the message should

> *go out in loud and in clear terms that there does come a limit to the tolerance of the Court to see its orders flouted by mothers even if they have to care for their young children. If she goes to prison it is her fault, not the fault of the learned judge who did no more than his duty to the child which is imposed upon him by Parliament.*

The case was followed by a dramatic increase in applications from fathers seeking to enforce Contact Orders, but it did not spur other judges to follow and the only notable case in recent years is that of a mother in Devon who was jailed for three months after ignoring no fewer than 18 Court Orders allowing her four-year-old son contact with his father.[462]

It can happen, though very rarely, that a judge will commit a person to prison without an application by the other party. In **Burgess v Stokes [2009] EWCA Civ 548** a mother had disobeyed two orders to make a child available for contact and one order to attend Court. All three orders had penal notices attached. Following the application for committal, the judge made a further order for contact with which the mother also failed to comply. There were other, historic breaches, but they did not form the basis of the committal.

In this case the mother was also breastfeeding a baby, the child of her new partner; the prison was unwilling to accept the baby without a further application by the Court and so committal would have led to separation of the mother and baby and a breach – albeit unintended by the judge – of the baby's rights under Article 8 to family life. This gave the mother the opportunity for the appeal, which the father did not oppose on the grounds that the mother had probably suffered a shock sufficient to make her comply with the order for contact. The less naïve appeal judge disagreed and directed a further hearing once the prison had responded to the court, and once the mother had had further opportunity to comply with the order. The judge commented,

> *The days are long gone when mothers can assume that their role as carers of children protects them from being sentenced to immediate terms of imprisonment for clear, repeated and deliberate breaches of Contact Orders.*

This case contradicts the usual perception that the courts cannot enforce their own orders unless the applicant makes further application for enforcement. They *can* enforce their orders, but they choose not to.

Note: that a court will still make a committal order or suspended committal order even if the party to whom it applies refuses to attend court, see **Re P (A Child) [2006] EWCA Civ 1792**, [2007] 1 FLR 1820 cited above. Failing to attend Court is a very foolish thing to do.

[462] Andrew Alderson, *Three months' jail for mother who kept child from his father*, Daily Telegraph, 22 February 2004, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/02/22/nkidz22.xml&sSheet=/news/2004/02/22/ixhome.html.

The preferable alternative to committal is an application for transfer of residence, discussed in **Section 5.5.7**, together with an application for a Section 91(14) order, see **Section 12.1.5**.

18.1.3. Disclosure of information

The rules on what information one may disclose in a family case and to whom (presented at 8.8.2) are complicated and have changed more than once. Even professionals have fallen foul of them, so it is not surprising if litigants get confused. Always check with the judge before you disclose if you are in doubt.

The Re A criteria apply: the applicant must prove contempt to the criminal standard and breach must have been deliberate.

At **8.5.6** we presented the case of Re N (A Child) [2009] EWHC 736 in which a father tried to have a CAFCASS guardian removed from a case because the court had found her to be in contempt following unlawful disclosure, although it took no action against her and dismissed the father's request. The father's loss of confidence in the guardian owed more to his 'subjective and inflexible views than to an objective and rational consideration of the interests of the child concerned'.

In **Davies v Welch [2010] EWHC 3034 Admin** a father attempted to have his wife's solicitor found in contempt for disclosing personal information about him and his children to the CSA. The Court accepted that this was indeed contempt, and noted that the solicitor, Mrs Madeleine Welch, only apologised to Mr Davies once there were proceedings against her, it declined, however, to make an order for committal. The solicitor was left with a £4,000 bill for instructing counsel and the judge's censure.

Re S-C (Children) [2010] EWCA Civ 21 was a wife's appeal against committal proceedings. She had breached a specific order forbidding disclosure by disclosing documents to her lawyer in Turkey. Lord Justice Wall ruled that the committal criteria were not met: there was no penal notice attached to the order, the order did not specify that such an action would be breach and a party must be free to discuss any legal issue with her legal advisors. Wall found Judge Plunkett's committal order to be 'manifestly unsound'.

In August 2011 Lord Justice Wall committed a wife's legal advisor, Elizabeth Watson, for repeatedly disclosing confidential information by circulating it to an extensive emailing list. This case had already received considerable internet and press attention and Wall saw fit to issue a press release. Watson was one of that strange fellowship, the Freemen-on-the-Land, who believe the law does not apply to them; she had,

> *unlawfully and in breach of court orders put into the public domain via Email and the internet a series of unwarranted and scandalous allegations abut the father and others. She has repeated the untruth that the father is a paedophile, and – without a scintilla of evidence – has attacked the good faith of all the professionals who have had any contact with the case.*

Watson served 10 days of her 9 month sentence before Wall ordered her release, suspending the remainder of the sentence for 2 years.

A few days after Watson's committal, another 'freeman', 85-year-old Norman Scarth, tried to use a 'common law' defence to justify recording court proceedings. He was jailed for 6 months.

Reviewing these and other cases this would be our advice: do not bring an application for committal unless you can satisfy beyond reasonable doubt all the committal criteria; otherwise you will look merely vindictive.

Familiarise yourself with the rules on disclosure. If you suspect committal proceedings are about to be brought against you, apologise profusely and in writing both to the applicant and to the Court. Remember that contempt must be shown to be deliberate.

18.1.4. Injunctive orders

Occupation and Non-Molestation Orders are injunctions under the Family Law Act 1996 Part IV[463] which forbid a party respectively to enter or approach his home or to molest the person named in the order. Penal notices are always attached to Non-Molestation Orders but will only be attached to Occupation Orders if the Court has specifically directed it. A penal notice attached to these orders will warn that the recipient may be committed to prison if it is proved beyond doubt that he has breached the order.

A party can also be committed for breaching an Undertaking. This is a commitment made to the Court that he will do or not do a certain thing. A penal notice can be attached to it, but there is no power of arrest.

18.1.5. Applications

An application for committal on notice (i.e. the respondent is given warning) is made on Form N78, 'Notice to show good reason why you should not be committed to prison' (you'll have to get this from the Court). You need to set out each breach and the order which was breached; remember that you must prove each breach beyond reasonable doubt. If you cannot prove it, don't include it. The respondent must then attend Court and argue why he or she should not be committed.

Think very, very carefully before applying to a court for the committal to prison of your child's other parent. What message will it send to your child? Do you think they will understand? Is what you are doing necessary, or is it, as is clearly very often the case, merely a vicious and vindictive attempt to hurt them as you believe they have hurt you?

Only make the application if there has been a consistent refusal to comply with orders over a period of years and if *all* other remedies have been tried. You do not want the other side attempting to portray you as merely vindictive. Committal raises temperatures and leads to more litigation and ill feeling. It does not support contact because the imprisoned parent will naturally tell the child that the other parent put them there.

[463] http://www.opsi.gov.uk/acts/acts1996/Ukpga_19960027_en_1

Should you want to withdraw your application you must apply to the Court to do so; though if you refuse to proceed the Court will probably be forced to dismiss the application.

An application to commit under the Family Law Act (Family Proceedings (Allocation to Judiciary) Directions 1999) can be heard by a circuit or district judge, but not by a recorder (unless nominated for public law work) nor a deputy district judge.

18.1.6. Committal hearings

The purpose of a committal hearing is threefold:

1. to secure compliance with the orders of the Court, and in domestic violence cases to protect the safety of the applicant;

2. to punish breaches of Court Orders;

3. to regulate the hearings of the Court and protect court users and staff.

The burden of proof is the criminal 'beyond reasonable doubt' standard and not the civil 'balance of probability' standard. It is important for both parties that serious allegations are proved to be either true or false; it is not desirable to have unproved allegations hanging around as they can prejudice a case.

The hearing should be held in open court with the judge robed. In some children cases the hearing may be held in private but judgement must still be given in open court.

If the matter cannot be dealt with at the initial hearing – perhaps medical reports are needed – the Court must issue directions regarding reports and the date of the next hearing

Orders must be drawn up on the appropriate Form N79 and the judge must then sign that form. The judge must state finding of fact for each breach proved, state which witnesses are believed, and state clearly if he found a party or a witness to have been lying.

Judges are warned that in committal hearings involving the potential loss of liberty of the respondent they must pay particular attention to the rules and to the respondent's human rights.

Where the hearing has been convened following arrest for breach of an injunction the Court can dismiss the application where,

- no reasonable grounds are disclosed for alleging contempt; or

- the application is an abuse of process; or

- there has been a failure to comply with a rule, practice direction or Court Order.

It is important, therefore, if you apply for committal that the breach is such as can be proved, and such as, if proved, will justify committal. Do not apply for committal if the breach is trivial or a mere

technicality; do not apply if the order has not yet been served on the respondent: you will simply come across as petty and vindictive.

If the breach is minor it is very unlikely that the Court will commit, and more likely that it will simply warn the respondent of the consequences of further breach.

If the applicant or a witness is unable to attend the hearing will be adjourned (though the Court may also dismiss the application), but if the respondent is unable to attend and the Court is satisfied he was informed of the hearing it is likely that it will still take place. The Court will take his absence as deliberate avoidance, and may issue a warrant for arrest. If you are the respondent, therefore, you are very strongly advised to attend. If the Court decides to commit it will defer sentencing until you attend.

If you are accused of contempt you cannot claim legal aid. If you are being represented in a family case you should inform your solicitor that you have been charged or arrested.

If you are the respondent you – and any witnesses you call – can still give oral evidence in Court without first producing an affidavit; the applicant cannot. Thus you are able legitimately to ambush the applicant.

18.1.7. Defending an application

If you are in Court defending an application for committal:

- First of all read the orders again carefully. Check exactly what it is they oblige you to do or forbid you from doing and compare this with what you have actually done. Are you in breach of the order?

- Next, read the power of arrest carefully; does it make clear which paragraph of the injunction it applies to (see **Rule 10.9** of the Family Procedure Rules 2010)? Check for any errors; are there any typographical or grammatical errors? If there are then you may be able to argue that the order could not be understood and so was not susceptible of breach. If there is any ambiguity it should be resolved in the interest of the party whose liberty is at stake.

- Was the arrest valid? Have you been arrested for breach of the order or was it for something else? You will need a photocopy of the arresting officer's notebook in which he recorded the arrest. If it does not record arrest for breach of the injunction you should be released immediately. Never admit guilt when arrested or you will obviously invalidate this loophole.

- If an injunction is to be enforceable it must be served personally. The applicant must provide proof that this happened, such as a statement of service from a process server. Do not admit that the papers were served on you; it is up to the applicant to prove it.

- If the process server has produced a statement of service, demand to know how you were identified. For example, the applicant's solicitor should have provided a photograph of you to the process server, or you admitted the identification. Otherwise there is no evidence to tie the service to you.

- There are circumstances in which the Court can use its discretion to dispense with the need for personal service of an order, for example if the respondent was already in court when the order was made. It would then be necessary for the applicant to prove that you had known about the order in some other way.

- Alternatively the Court may have made an order for substitute service to allow the applicant to put the order through the letter box of your last known address – if so it will say so on the order.

- If that is the case you can argue that you never saw the order and that you were thus not effectively served. Even if there was an order for substitute service, you cannot be in contempt of the order if you knew nothing of it. The onus is on the applicant to prove that you knew of the order. The judge will then need to establish whether or not you read it – if it was just pushed through your letter box you may have thrown it away as junk mail, or you may share a letter box in a shared house.

- Note that if you are charged with breach of an Undertaking – a document you sign in Court – the document must still be served on you to be valid, and the Court has no discretion to dispense with service. This could form the basis of a possible defence if you claimed that you did not fully understand the nature of the undertaking made and had not been served; you are more likely to get away with this defence if you are an LIP. See Hussain v Hussain [1986] 2 FLR 271 which led to this little used rule.

- Before you can be arrested for breach of an injunction the power of arrest – not the order – must be served on the police station set out in Form 404a for a Non-Molestation Order or in Form FL406 for an Occupation Order. Where a power of arrest is attached to an injunction one or other of these forms must be delivered to the officer in charge of your nearest police station. Again, it is for the applicant to prove that this has happened, and the statement of service will confirm, with the date and time of service and detail of what documents were served.

- If the power of arrest has not been served the arrest is invalid and you must be released. It may be that the process server will have to be summoned to Court, and if he cannot provide evidence that the papers were served the Court will have to find that they were not.

- In addition to the power of arrest, 'a statement showing that the respondent has been served with the order or informed of its terms (whether by being present when the order was made or by telephone or otherwise)' must also be delivered to the police station. The statement should record that this has been done, otherwise the arrest is invalid and you must argue for release.

- Under **Section 47(7)(a)** of the Family Law Act 1996 you 'must be brought before the relevant judicial authority within the period of 24 hours beginning at the time of [your] arrest', excluding

Christmas Day, Good Friday or any Sunday. If 24 hours expire before you are brought to Court you should argue for release.

If all of the above fail you can either admit your breach of the order and be sentenced accordingly, or the Court will have to adjourn for a full hearing which must take place within 14 days if there are no further allegations. If the 14 day limit is exceeded the Court's power to deal with the matter expires and you should be released.

If the applicant wishes to add further allegations they must do so on Form N78. They may also do this if you are released, though it is unlikely they will succeed or persevere: the failure to have you convicted usually takes the wind out of the applicant's sails. Some of the tactics for dealing with arrest sound underhand, and so they are, but so too was the attempt to have you arrested in the first place, and, indeed, the legislation itself. It's all a game – you just need to learn the best moves, and if you are the applicant and not the respondent, the above will warn you of some pitfalls to avoid.

18.1.8. Sentencing

If Contempt of Court is proved the Court can impose a fine or commit the contemnor to prison for a period of up to 2 years. For a first or minor breach of the order committal can be suspended.

Prisoners serving a sentence for contempt have privileges not granted other prisoners and can be released after serving half their sentence. Orders can be suspended for a set term or indefinitely. No order can be made on a person under 18; persons between 18 and 21 must be sent to a young offenders' institution.

When considering what sentence, if any, is appropriate the Court must consider:

- Was the respondent present when the order was made?
- How soon after the making of the order was it breached?
- What is the previous history and in particular have there been earlier breaches?
- How serious is the breach?
- Were there aggravating features such as the presence of children?
- What if any is the mitigation?
- Did the respondent admit the breaches, and if so when?
- What would be the effect of an immediate sentence of imprisonment on the respondent's domestic circumstances, employment, health etc.?
- Is the breach likely to be repeated?

18.1.9. Appealing a committal

Under the Civil Proceedings Rules **52.3(1)(a)** permission of the Court is *not* required to appeal an order for committal. This applies to first appeals from a district judge to the circuit judge and first appeals from a circuit judge to the Court of Appeal. A second appeal still requires permission from the Court of Appeal.

In committal cases respondents must:[464]

- be given precise details of the allegations in written form;
- be warned of the possible consequences of the allegations being proved; and
- be given the opportunity to obtain legal advice or representation.

Where these principles are not adhered to you have a good chance of overturning any order on appeal.

18.1.10. Attending hearings

Campaigners who plan to attend and support a committal case should know their rights in the event that their entry is barred at the court, as happened to one member of *Fathers 4 Justice* who was barred entry by the Court Security Manager on no other grounds than that he was recognised as a member and suspected (on no evidence) of being there for some improper reason.

The court sits in open court which means members of the public have the right to attend the hearing in the courtroom, subject of course to good behaviour. As Lord Halsbury said in Scott v Scott [1913] AC 417 - 'I am of the opinion that every court of justice is open to every subject of the King'.

If your only purpose is to attend this hearing then the Court Manager, Tipstaves, and security staff have no right to prevent you and if they do or attempt to do so they are acting unlawfully. Merely because you are a member of a parenting organisation or wearing a tee-shirt is not evidence that you are there for any inappropriate purpose and if you explain that you have come to attend the hearing of XYZ case in court N, any official is acting unlawfully if he tries to bar your going into the court.

You are entitled then to proceed peacefully on your way and if the official lays hands on you he is committing an unlawful assault and a criminal Contempt of Court, plus human rights violations (Article 10). The official and his employer can be sued, so if need be make notes, take names and gather evidence with a view to suing.

If obstructed you can also insist on seeing the judges in the Court, who are the ones with power to decide who is to be in their courtroom or not.

In the courtroom: subject to orderly behaviour and decent attire you are entitled to be present. Casual wear including tee-shirts cannot be

[464] See Newman v Modern Bookbinders [2000] 2 All ER 814

objected to, in contrast, for example, to fancy dress which causes distraction, detracts from the dignity of justice, and could reasonably be said to impact adversely on the administration of justice, justifying a judicial order to remove the wearer – no disrespect to Batman or Robin intended.

18.2. Arrest

As a parent the offences or alleged offences for which you are likely to be arrested fall into two categories. The first are offences associated with your case: if your children's other parent is trying to obstruct contact it is possible that they will seek a Non-Molestation Order against you, and an Occupation Order by which they will be able to oust you from your former home. The preferred way to achieve this is to make an allegation of harassment and have you arrested. An alternative way to arrange your arrest is to make false allegations against you that you have physically or sexually abused your children.

Harassment, Non-Molestation Orders and interviews with the Child Protection police are discussed above in Chapter 12 as part of the armoury of measures your children's other parent can use in order to prevent contact.

The second category of offences are those you may be alleged to have committed when engaged in protests and stunts as part of your campaigning activities.

We have already seen that under **Section 154** of the Criminal Justice and Public Order Act 1994 a person is guilty of the offence of harassment if he '(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress'.

This is why all demonstrations need to be organised by liaising with the police, and why it is not a good idea if you mount a demonstration of your own outside your ex's home. You are likely to be arrested even if you have not strictly broken any law. The two defences allowed in the Criminal Justice and Public Order Act are that you didn't expect the person demonstrated against would see or hear your demonstration and that you consider your conduct reasonable. Sometimes fathers' rights protesters have mounted demonstrations outside the homes of judges, knowing them to be away, so the first defence would apply, although provided such demonstrations are peaceful the police are usually supportive.

18.2.1. Power of arrest

Where a power of arrest has been attached to an order under **Section 47** of the Family Law Act 1996 a police constable can arrest the respondent without warrant but must – under Section 47(7) – bring him before a judge within 24 hours of the arrest (excluding Christmas Day, Good Friday or any Sunday).

An arresting officer must have reasonable grounds for arrest, and the Court must be satisfied that:

- the conduct alleged related to a provision in the injunction order to which a power of arrest was attached;

- that the officer had reasonable grounds from what he had seen or been told to suspect that a breach had occurred; and

- that the respondent has been brought before a judge within the required time limits.

Where a power of arrest has not been attached, you can apply to the Court to issue a warrant, substantiated on oath and showing reasonable grounds for believing that the respondent has failed to comply with the injunction (Sections 47(8) and (9)).

Under the **Protection from Harassment Act 1997** there is no power to attach a power of arrest to an injunction but there is power to issue a warrant on evidence as above (Sections 3(3) and (5)).

In either case, where a respondent is brought before a court, the breaches alleged should be written down and given to him so that he knows exactly what the case is against him.

18.2.2. You've been arrested

You do not have to go to a police station or 'help with their enquiries' unless you are arrested, though it may be sensible to cooperate if you want to avoid arrest; you cannot be arrested simply in order to answer questions, there must be grounds for arrest. Most arrests will be carried out under **Section 24** of the Police and Criminal Evidence Act 1984 (PACE) as amended by the Serious Organised Crime and Police Act 2005 (SOCPA). PACE provides for a number of 'Codes' which were amended in 2003; detention is dealt with under Code C, search of premises under Code B and tape recording of interviews under Code E. The police must comply with this legislation; the arresting officer must give you enough information for you to determine whether or not your arrest is lawful. Under SOCPA you may only be arrested if,

1. the constable has reasonable grounds for thinking that he could not reliably obtain the identity of the suspect; or

2. it is necessary to prevent injury;

3. it is necessary to prevent loss or damage to property;

4. it is necessary to prevent an offence against public decency;

5. the suspect is unlawfully obstructing the highway;

6. it is to protect a child or other vulnerable person;

7. it is necessary to provide for prompt and effective investigation; or

8. it would hinder investigation or prosecution if the suspect runs off.

You can also be arrested if it appears that you are about to commit a 'breach of the peace'.

You must give the police your name, address and date of birth; they may also take your photo, fingerprints and non-intimate body samples for DNA testing.

The police can search you for anything related to an offence, for anything you may use to escape, or anything with which you may harm yourself or others. Only these items may be taken from you; they will be listed on the custody record which you will be asked to sign. You must sign *immediately* below the last item on the list, so that no incriminating items can be added after you have signed. Do not sign if there is anything on the list which is not yours, or if there is anything incriminating. The police will put you in a cell until they are ready to interview you.

If you have not yet worked out your defence your best option will be to remain silent until you have worked out a good defence with your legal advisors, rather than risk saying the wrong thing under pressure from the police. Refusing to speak to them is not an offence, whatever they may say.

If you are arrested for alleged harassment of your children's other parent because you have tried to visit your children, or have written to them, then when you are found not guilty (assuming the CPS is daft enough to continue to trial) or when the case is withdrawn by the CPS, you should sue your ex for malicious prosecution and sue the police for malicious prosecution, wrongful arrest, and false imprisonment. It is the only way to stop these ridiculous cases.

If there is not sufficient evidence to charge you the police can:

- Release you unconditionally;
- Release you on bail – only if they believe further investigation will lead to evidence leading to a prosecution;
- Detain you for interview.

If there is sufficient evidence you will be released with or without bail or be detained. If you are charged you will be cautioned and given a written record of the offence with which you have been charged. You will not be questioned further. Once you have been charged you must be released, unless the custody officer has reasonable grounds to believe,

- that you have not given your real name and address;
- that you will not turn up in Court for your case to be heard;
- that you will commit further offences while on bail;
- that you will interfere with the investigation; or
- that you need to be kept in a cell for your own protection.

The caution will take the form: 'You do not have to say anything, but it may harm your defence if you do not mention something when questioned that you later rely on in court. Anything you do say may be given in evidence'. Under **Section 35** of the Criminal Justice and Public Order Act 1994 if you do remain silent then when your case comes to Court your refusal to speak to the police can be taken as

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evidence of guilt. Most people will be familiar from TV with the American version of the caution, known as Miranda, under which remaining silent will *not* be taken as evidence of guilt.

Never, ever, ever accept a caution if you are innocent, it is an admission of guilt and will inevitably be used against you later, for example in a residence or contact dispute. The police may offer you a deal to accept the caution – don't fall for it. **Don't ever accept a caution if you haven't committed the offence for which you are being cautioned.**

Your detention must be reviewed after 6 hours and then at 9 hour intervals. You should be released within 24 hours after arrest or charging, and this can be extended for another 12 hours on suitable grounds. To detain you for more than 36 hours the police must obtain a warrant from a Magistrates' Court. They can also take you back to the Court for an extension to the warrant; the maximum they can detain you for is 96 hours, they must then charge or release you. You must be provided with meals, drink, clothing, toilet and washing facilities and be allowed 8 hours of sleep in a 24 hour period.

18.2.3. Using the duty solicitor

You should normally be allowed to let someone know where you are and to arrange for a solicitor as soon as you arrive at the police station. If you have been arrested for a 'serious arrestable offence' this can be delayed for up to 36 hours on the authority of an inspector, if he thinks that your notifying someone could result in further offences being committed or the destruction of evidence, etc (**Section 56** PACE).

You have the right to talk to a solicitor, in private, at any time. Don't let the police bully you out of exercising this right, for example by saying you don't need one. You can accept the duty solicitor, whose advice is free, or pay for your own solicitor. The duty solicitor is unlikely to give you the best service; if you can, find a good solicitor in your area; the police are wary of good solicitors. Avoid telling your solicitor exactly what happened; you can discuss this later. Refuse to be interviewed unless your solicitor is present.

18.2.4. The interview

Any question beyond your name and address constitutes an interview and must be conducted under regulations. The interview will usually take place in an interview room in the police station. During the interview you will be questioned about the alleged offences with which the police want to charge you.

If they have sufficient evidence to charge you they will not interview you. An interview therefore is an indication that they do not have sufficient evidence and it is carried out for their benefit only in the hope that you will incriminate yourself and/or other people. It used to be to your benefit to say nothing, however silence will now be used against you in Court, and you should answer reasonable questions if you can. You will not be able to say 'no comment' in court. The police may not interview you without cautioning you and without giving you the option of a solicitor.

The police are judged according to targets for convictions, and police officers win promotion through 'solved' crimes (crime prevention is a very old-fashioned idea). It is not in their interest to waste time interviewing you unless there is a reasonable chance of a successful prosecution.

18.2.5. Telling the truth

The only place where you need to tell the whole truth and to be honest is in court in front of a magistrate or jury. You will only end up in Court if the police have sufficient evidence against you to mount a prosecution.

You will only be interviewed if they do *not* have sufficient evidence. If you end up in Court or not depends therefore on what you say when being interviewed. Saying nothing or 'no comment' can keep you out of Court; on the other hand if you do end up in Court anyway it can be incriminating. You need to assess how much evidence the police already have; if they have enough, anything you say will only add to that.

The police will try to intimidate you and confuse you. They will try to get you chatting to soften you up, and ask questions unrelated to the alleged crime. Don't fall for this. Don't answer a few irrelevant questions and then clam up when you are asked a question about the alleged crime, it will look worse in Court. The police must present any evidence they have to the Crown Prosecution Service; a copy of this will be sent to your solicitor.

The evidence usually rests on very small points: this is why it's important not to give anything away in custody. If they don't have enough evidence the case can be thrown out of Court or never even get to Court. This is why they interview you: to get you talking – one misplaced word can drop you into a whole world of trouble.

18.2.6. Traps to look out for

These are some of the tricks the police will use to make you talk; don't fall for them:

- Playing you off against a colleague who has also been arrested. If your mate has told them the whole story, why do they still need your evidence?
- Using your first name to establish a relationship; particularly if you are young or vulnerable they will act in a fatherly or motherly way.
- 'As soon as we find out what happened you can go.' Yeah, right.
- 'What's a nice kid like you doing caught up in a thing like this?'
- 'We'll keep you locked up until you tell us.' Under the rules outlined above they can't.
- Threatening you with a more serious charge if you don't confess to the lesser one. They are unlikely to charge you with anything which won't stand up in Court.

- Picking on your weak spots: threatening to arrest your girlfriend or mother and subject them to a strip search.

- Threatening to have your children taken into care (especially if you are a mother).

- Trying to make you agree to an interview without a solicitor or without following regulations: 'the tape recorder's broken' (sometimes this is true!), 'we can't get hold of your solicitor,' etc.

- Doing a deal: 'admit to this charge and we won't mention the other one,' or 'we'll get the judge to give you a light sentence.' The police don't do deals.

- 'They've abolished the right to silence - you have to tell us everything now, it's the law.' Although your silence can now be used as evidence against you, you can still refuse to say anything.

- Sometimes the police will use violence on you to get a confession, especially if you are charged with an offence against a police officer. You may decide to confess rather than risk serious injury, but you will have trouble retracting your confession later in court: juries don't want to accept that the police use such methods and probably will choose not to believe you.

Remember,

- Stay calm and cool when you are arrested; you are on their home ground;
- Always get a solicitor;
- Never make a statement;
- If they interview you it's because they lack evidence;
- Don't give them the evidence they need to prosecute you;
- If they are violent, see a doctor immediately after being released and get a written report from him of any injuries or marks. Make a note of the officers' names and numbers if possible.

18.2.7. If a friend is arrested

If someone you know has been arrested, there is much that you can do to help them from the outside,

- If you know what name they are using, as soon as you think they have been arrested, ring the police station: ask whether they are being held there and on what charges;

- Inform a reliable solicitor;

- If you can get access to the arrested person's house, remove anything that the police may find interesting: computer, letters, address books, false IDs, etc, in case the police raid the house;

- If you run no risk of being arrested yourself (obviously) take food, cigarettes, etc into the police station for your arrested friend.

The police have been known to lay off a prisoner if they have visible support from outside; it is solidarity which keeps prisoners in good spirits.

The same applies to friends in prison.

18.2.8. Demos & protests

According to Foulkes v Chief Constable of Merseyside Police [1998] 3AER 705 only a sufficiently real and present threat to the peace justified depriving a citizen, not at the time acting unlawfully, of his liberty. Further, the citizen's conduct would have to interfere with the rights of others with the natural consequence of other than wholly unreasonable violence from a third party – see Redmond-Bate v DPP [1999] TLR 28/7/99. See also the useful summary of legal principles in Bibby v Chief Constable of Essex Police [2000] TLR 24/4/00.

18.3. Cases

Committal

Scott v Scott [1913] AC 417
Danchevsky v Danchevsky [1975] Fam 17
Ansah v Ansah [1977] Fam 38
Churchard v Churchard [1984] FLR 635
Thomason v Thomason [1985] FLR 214
Hussain v Hussain [1986] 2 FLR 271
Wilson v Webster [1988] 1 FLR 1097
A v N (Committal: Refusal of Contact) [1997] 1 FLR 533 (CA)
Nicholls v Nicholls [1997] 1 FLR 649
Foulkes v Chief Constable of Merseyside Police [1998] 3AER 705
Redmond-Bate v DPP [1999] TLR 28/7/99
Bibby v Chief Constable of Essex Police [2000] TLR 24/4/00
Glaser v UK [2000] 3 FCR 193; [2000] 1 FCR 153 ECHR
Re K (Children: Committal Proceedings) [2003] 2 FCR 336
Re D [2004] EWHC 727 (Fam)
Hansen v Turkey [2004] 1 FLR 142
Re M (Contact Order: Committal) [2004] EWCA Civ 1790
Re S (Contact Order: Committal) [2004] EWCA Civ 1790
Zwadaka v Poland [2005] 2 FLR 897
Re P (A Child) [2006] EWCA Civ 1792, [2007] 1 FLR 1820
Re A (A Child) [2008] EWCA Civ 1138
Re V (Children) [2008] EWCA Civ 635
Burgess v Stokes [2009] EWCA Civ 548
Re N (A Child) [2009] EWHC 736
Davies v Welch [2010] EWHC 3034 Admin
Re L-W (Children) [2010] EWCA Civ 1253
Re S-C (Contempt) [2010] EWCA Civ 21

CHAPTER 19: ENDING THE FIGHT

> *Yet there will be many fathers forbidden by the savagery of our laws to be with their children, standing broken, as I have, outside their old homes, the keys still in their pockets, weeping and whispering goodnight as they watch each child's bedroom light switch off before turning away, maddened with grief, to the pointlessness of a lonely Christmas Day.*
>
> Bob Geldof [465]

19.1. Letting Go

Protracted litigation is immensely taxing on your health and your spirit. It is entirely natural and understandable if you find it difficult to cope and doubt whether you have the strength to carry on.

Before you decide to give up entirely, consider the Retreat Strategy detailed below. Threatening to walk out of the courtroom or away from the entire process can focus minds very effectively, and if your children's other parent – or indeed the judge – is deriving some sinister pleasure from prolonging proceedings, it may make him or her think more clearly about what they are doing. If you leave the proceedings, perhaps even threaten to leave the country, it will also have implications for any maintenance he or she is receiving.

The fault lies in the injustice of the system and not in you. And the system is, if you will forgive the expression, fucked. Don't beat yourself up. If you decide to walk away after years of litigation you are no less of a parent, and if by doing so you reduce the relentless pressure your child will have been placed under to say how much he hates you, how much he doesn't want to live with you, or how much you have abused him, then perhaps it makes you more of a parent.

[465] Sir Bob Geldof, *Fatherless Christmas*, The Sun, December 2003

If at this stage you are still using a solicitor, it may be his inability to progress your application which is getting you down. For God's sake get rid of him and represent yourself. You will get a new lease of life and may well find that things begin to go better.

Contact centres are degrading and exploitative, however enduring them can be worthwhile if you can come through on the other side with your children. Their use must, however, only be temporary and for a specific purpose and must not be open-ended. The order must state how long the contact centre is to be used and why. Their use must be a part of your overall strategy, to be followed by visiting contact and then shared residence.

If you reach the end of your tether and decide you can no longer use a contact centre, and if the Court is then forced to make an Order for No Contact, you can still hold your head up high knowing that it is not you but the courts that have deprived your children of a parent.

Fathers 4 Justice have been involved in a significant number of cases in which the only sensible advice we have been able to offer is that the applicant should give up. There are a number of reasons why cases reach this point (and often people come to F4J for help as a last resort), including implacable hostility and severe alienation. Perhaps the most common reason, however, is that a parent has left it too long to make an application and has allowed a *status quo* to develop in which they no longer play a role. The system adds so much delay to the process that it is really essential not to add any yourself. Even a gap without contact of a few months will result in supervised contact in a contact centre; a gap of a year or more will make it very unlikely that you will ever regain contact.

If you have exhausted all the legal options you must hope that one day your child will try to find you. It does happen, and it happened to me after 7½ years of waiting. Make the journey easy for him. Maintain a high profile on the internet, so that a search under your name will lead to you or to your website. Do not change your email address, Facebook identity or phone number(s). Stay in touch with those people and organisations with which your child will associate you: relatives, friends, workplaces, schools, leisure activities and clubs; churches, synagogues and mosques.

Although it may be difficult, try to stay optimistic and in good health; don't seek false comfort in alcohol or drugs.

Keep a record of the things you have done to try to maintain contact: make up a story-book for your child, containing photographs of you on demonstrations and protests; put in it the most salient documents in your case – copies of Court Orders and your chronology. One day your child will need to face the truth.

And remember: never hate your children's other parent more than you love your child.

19.2. The Retreat Strategy

The purpose of the Retreat Strategy is to remain a parent to your children; not to withdraw from their lives altogether. It was devised by the remarkable campaigner Ivor Catt, and takes as its starting point the principle that non-resident parents have little hope in the secret Family Courts. Things have changed somewhat since Catt proposed his Strategy, but not by much. He gives a non-resident two options:

1. To spend the rest of his life battling in the courts and struggling in life to access his children, in a game where all the cards are stacked against him; or

2. To withdraw.

Withdrawal or Retreat is promoted as the parent's only rational response to the fact that,

> *ethical considerations have no bearing on society's treatment of children (or of fathers) which now are the chattels of their mother. Retreat recognises that considerations of justice and of the law, or of the rights of the child, or of its well-being, play no part in the deliberations and decisions of our secret Family Courts. Retreat recognises that the sole consideration driving our secret Family Courts is that of Power, linked with the maximisation of legal and court costs.*

The essence of Retreat is to render the family justice system economically unworkable: the retreating parent undertakes to have no further contact with his children, he also undertakes never again to earn taxable income, and to move into the black economy, or onto benefits. This ensures that neither the system through legal fees nor a resident parent through child support can profit economically from the denial of a parent to his child.

Before the first divorce hearing, the divorcing non-resident parent, plus as many of his relatives as he can muster, hold a farewell party for his children. He tells them that if the judge makes a sole Residence Order in favour of the Person With Care, he'll never again earn a taxable income. Further, both he and his relatives will cease all contact with the children, and all financial support.

He and his relatives then give the children their farewell presents. The event and the decisions are reported to the judge, and entered into the court file, in the form of signed letters from each relative, and a signed statement from the NRP. They will only withdraw their joint decision to retreat if future legislation enables the PWC to ask the Court to permanently disqualify itself from further involvement in their family.

One advantage of the retreat is that, since the facts of the case have no bearing on the outcome, there's no need for a court hearing. This represents a great saving for the State in court costs and in legal aid. It's important that the NRP shouldn't have any legal representation or make any verbal submissions, he must submit his documentation and his prescribed Court Order to the judge, and remain silent; possibly not even attend. The facts seldom do have a bearing, but the

realisation that the children lose all contact with the NRP is camouflaged by the issuing of worthless Contact Orders which are never enforced.

The key to this strategy is that the sole source of the necessary wealth to keep the children from being a charge on the State is the future earnings of the NRP. What fraction of the GNP is lost if all divorced men or half of divorced men quit the labour force?

There are simpler forms of the Retreat Strategy, based on unilateral withdrawal or, better, a simple mutual refusal to continue battering each other to death in the Family Courts, but they lack the intellectual coherence of Ivor Catt's version.

In his autobiographical account *Fathers 4 Justice: the inside story* Fathers 4 Justice founder Matt O'Connor relates the moment when he finally snapped with his ex wife's barrister and opted out of the family justice system,

> *'You can take your judicial buggery and fuck off back to your client and tell her that I'm out of here today. The party's over and you... you can administer your black alchemy on some other poor hapless bastard.'*
>
> *In court I tell the judge that I'll put her out of a job whatever it takes. My shredded emotions had short-circuited any kind of self-control. 'One day,' I tell her, 'you'll rue the day you ever met me. It's the beginning of the end for you and your kind.'*
>
> *I was lucky my diatribe didn't land me in the cells, but I was past caring by then. I'd grown sick of this grotesque pantomime that passes as family law: CAFCASS officers sitting there, writing reports as the family goes up in smoke; parasitic solicitors feeding off the detritus of divorce; barristers and judges masquerading as arbiters of justice – so many of them cold-hearted and devoid of any moral compass.*
>
> *I'd had enough. I'd got to the point where I had to risk walking away from the kids for ever.*

The strategy worked; but only because Matt's ex was a Punisher (see **Section 6.1.3**); had she been an Eraser, he would indeed have been forced to walk away for ever. Matt's relationship with his two boys was restored, and continues to this day. Just as importantly, he has been able to forgive their mother, but he will never forgive the system which had so nearly cost him his children.

19.3. Withdrawing a Case

If you decide that you can no longer pursue an application for contact, you may only withdraw your application with the leave of the Court. **Rule 29.4** of the Family Procedure Rules 2010 requires you to produce a written request for the Court's permission, setting out your reasons. You can make the application orally in Court if the other parties to the case are present. This is perhaps the most humiliating thing a father

can be forced into doing, and the greatest indictment of the family justice system which has forced him to demean himself in this way.

Don't imagine that this will necessarily be the end of it. Your ex will almost certainly pursue you for child support through the CSA – that is a given. She may very well throw other applications at your retreating back such as ones for Non-Molestation Orders, Prohibited Steps Orders and Section 91 orders. The intention is to provoke a reaction and to keep you embroiled in this monstrous system. Don't give her that satisfaction. Walk away.

In December 2003 Mr Justice Wall (now President of the Family Division) took the unusual step of giving judgement in open court in a case – **Re O (A Child) [2003] EWHC 3031 (Fam)** – in which a father had made an application, unopposed by the mother or CAFCASS legal which was representing the child, to withdraw his application for contact with his 12 year-old son, 'O'. The mother had obstructed and thwarted contact for more than five years despite a series of Court Orders, and the Court had progressively reduced the father's contact, finally ordering complete cessation. In despair the father produced a statement headed *Enough is Enough*. In it he accused O's mother of child abuse, perverting the course of justice, defamation of character and perjury and made similar complaints against her solicitors. He accused CAFCASS Legal of 'not encouraging shared parenting… and therefore of child abuse'.

Wall repeated two important points made in the Government's 2002 consultation document, *Making Contact Work*,[466] the first referred to delay:

> *The current procedures are too slow. There is insufficient court time and a lack of resources: cases take too long to come to court. There are substantial delays which are detrimental to children and their parents.*

The second referred to the adversarial system itself,

> *The litigation process is adversarial and counter-productive. It entrenches attitudes rather than encouraging them to modify. It tends to focus on the arguments of the parents, not the needs of the child. It puts particular pressure on the divided loyalties of children.*

But Wall reserved his most censorious comments for the father, whose behaviour over the many years the case had run, he claimed, had become increasingly unreasonable, and he sought to use the case to make the point that fathers' criticism of Family Court judges wasn't justified and that family cases fail not because of the defects in the system, but because of poor parenting. In exonerating the family justice system Wall failed to appreciate fully the extent to which the system and his own actions had contributed to the terribly sad conclusion.

[466] *Making contact work: a report to the Lord Chancellor on the facilitation of arrangements for contact between children and their non-residential parents and the enforcement of Court Orders for contact*, DCA, February 2002, http://www.dca.gov.uk/family/abfla/mcwrep.pdf

We have already commented on the similar case of **Re D [2004] EWHC 727 (Fam)** in which the judge, Mr Justice Munby, described the father as 'consistent and sincere in his wish for contact'; 'a balanced, fairly well-integrated man who could acknowledge both his own deficits as well as reflect on his past behaviour and consider errors, misjudgements and misdemeanours. His view of others was equally balanced; he had no difficulty in adopting another's perspective and could easily acknowledge alternative viewpoints and alternative hypotheses.'

Munby made nothing like the criticism Wall made of the father in Re O, nevertheless, the case followed a similar trajectory, the mother consistently obstructed contact, despite on one occasion being imprisoned, and the contact ordered, but never successfully enforced, dwindled away to nothing. Finally, as in Re O, the father applied in despair to withdraw his application for contact.

The level of delay was similar: a penal notice was added to the order, a year later a suspended sentence was imposed, and after another year the mother was committed. Munby's judgement was given two years later. All the allegations made by the mother against the father proved groundless.

Like Wall, Munby also decided to make criticisms of the system,

> *Those who are critical of our family justice system may well see this case as exemplifying everything that is wrong with the system. I can understand such a view. The melancholy truth is that this case illustrates all too uncomfortably the failings of the system. There is much wrong with our system and the time has come for us to recognise that fact and to face up to it honestly.*

Munby identified eight fundamental failures made by the system in this case:

1. the 'appalling' and 'scandalous' delays of the Court system;
2. the lack of judicial continuity – 43 hearings, 16 judges;
3. the huge bulk of evidence – each new hearing necessitates new reports;
4. no fewer than 9 final hearings all adjourned by the courts;
5. the delay in the Court making a finding with regard to the 'groundless' allegations;
6. the delay in appointing an expert;
7. the delay in appointing a guardian;
8. 'the characteristic judicial response when difficulties with contact emerged: reduce the amount of contact and replace unsupervised with supervised contact.'

In his conclusions Munby made a number of recommendations:

- The removal of as many cases as possible from the court room – he refers to the Early Interventions Pilot Project discussed in *Family Justice on Trial* as a possible solution.

- A twin-track procedure whereby simple cases are fast-tracked to be dealt with in a matter of weeks and more complex cases are resolved perhaps in months but certainly not in years.

- Tackling the endemic and unacceptable delay of the system and setting appropriate timetables.

- Judicial continuity and case management.

- The appointment of an independent, skilled social worker for the duration of an intractable case.

- The speedy investigation and resolution of allegations. Allegations made at later hearings should be regarded with scepticism. Finding of fact hearings must not be put off (to be dealt with on another day by another judge) and the habit of ordering supervised contact in the meantime must be resisted.

- Effective enforcement of orders, including committal where necessary,

  efficient, enforcement of existing Court Orders is surely called for at the first sign of trouble. A flabby judicial response sends a very damaging message to the defaulting parent, who is encouraged to believe that Court Orders can be ignored with impunity, and potentially also to the child.

We could not endorse Mr Justice Munby's submission more enthusiastically; these are all improvements to the system for which we have called repeatedly. The tragedy for the hundreds of thousands of children and parents who have been processed through the Family Courts since Munby made this judgement is that not one of these recommendations has yet been implemented. We can conclude that despite Munby's identification of a failing system, the problem is not procedural but the consequence of a total lack of political understanding and will. The more disturbing conclusion is that this is how our political masters wish the family justice system to be.

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RESOURCES

Resource 1: Legislation & Guidance

English & Welsh Legislation

Magna Carta cap.40 – first codification of English law; little still in force (*Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam*)
Matrimonial Causes Act 1857 – enabled Court to make custody orders
Offences against the Person Act 1861 – wounding and grievous bodily harm felonies
Matrimonial Causes Act 1923 – wives able to divorce husbands for adultery
Guardianship of Infants Act 1925 – established welfare of child as Court's paramount consideration
Legitimacy Act 1926 – enabled children to be legitimised by subsequent marriage of parents provided neither was married to a third party at time of birth
Infant Life (Preservation) Act 1929 – destruction of unborn child a felony
Children and Young Persons Act 1933 – all child protection legislation consolidated into one act
Matrimonial Causes Act 1937 – liberalisation of divorce
Wireless Telegraphy Act 1949
Registration of Births and Deaths Act 1953 – compulsory registration of births
Legitimacy Act 1959 - enabled children to be legitimised by subsequent marriage of parents, regardless of parental status
Administration of Justice Act 1960 – controls publication of documents relating to proceedings
Abortion Act 1967 – legalised and regulated abortion
Divorce Reform Act 1969 – established grounds for divorce
Family Law Reform Act 1969 – allowed illegitimate children to inherit and use of blood tests to determine paternity
Administration of Justice Act 1970
Matrimonial Causes Act 1973 – principle item of legislation governing divorce
Litigants in Person (Costs & Expenses) Act 1975 – enabled LIPs to recover proportion of their costs
Adoption Act 1976 – gave adoptees right to see birth certificates
Magistrates Court Act 1980 – codified procedures applicable to Magistrates' Courts

Supreme Court Act 1981 – later named Senior Courts Act; defined the Senior Courts, i.e. Court of Appeal, High Court and Crown Court
Child Abduction Act 1984 – created offence of child abduction
Matrimonial and Family Proceedings Act 1984
Police and Criminal Evidence Act 1984 – (PACE) established legislative framework for combating crime
Child Abduction and Custody Act 1985
Family Law Act 1986
Public Order Act 1986 – created a series of public order offences such as riot, violent disorder and harassment
Family Law Reform Act 1987
Malicious Communications Act 1988 – criminalised the sending of letters which cause distress
Children Act 1989 – introduced concept of parental responsibility and shifted authority over children from parents to the State
Courts and Legal Services Act 1990 – changed way legal profession was organised and regulated; some changes to Children Act
Human Fertilisation and Embryology Act 1990
Child Support Act 1991 – created the Child Support Agency
Child Support (Maintenance and Special Cases) 1992 – removed option for shared parenting
Social Security Contributions and Benefits Act 1992
Criminal Justice and Public Order Act 1994 – removed right to silence, allowed police to take intimate body samples, increased 'stop and search' powers
Marriage Act 1994 – further undermined marriage by allowing solemnisation in venues other than churches and register offices
Child Support Act 1995 – introduced system of 'departures' from 1991 formula including some recognition of contact costs
Family Law Act 1996 – never fully implemented; part of Brenda Hoggett's abuse of Law Commission to achieve feminist social change, she sought to eliminate legal distinction between marriage and cohabitation
Protection from Harassment Act 1997 – criminalised stalking and bullying in workplace and redefined harassment as course of conduct
Human Rights Act 1998 – incorporated European Convention on Human Rights into UK law
Criminal Justice (Terrorism and Conspiracy) Act 1998 – often shortened to Justice Act; concerned 'proscribed organisations' and conspiracy to commit offences outside UK
Access to Justice Act 1999
Child Support, Pensions & Social Security Act 2000 – providing false information to CSA became an offence; step children taken into account in assessments
Criminal Justice and Court Services Act 2000 – prevented 'unsuitable' people from working with children
Adoption and Children Act 2002 – overhauled and modernised legal framework for adoption; enabled unmarried fathers and step fathers to acquire PR
Human Fertilisation and Embryology (Deceased Father's) Act 2003 – allowed some deceased men to be registered as fathers
Children Act 2004 – knee-jerk reaction to Victoria Climbié inquiry – designed to promote coordination between all child protection agencies
Domestic Violence, Crime and Victims Act 2004 – extended provision of trials without juries, allowed bailiffs to force entry into homes and criminalised non-compliance with non-molestation orders
Serious Organised Crime and Police Act 2005 – (SOCPA) extended police powers of arrest and restricted right to protest

Children and Adoption Act 2006 – introduced 'contact activities' and other sanctions to counter breach of orders
Child Maintenance and Other Payments Act 2008 – established Child Maintenance and Enforcement Commission and introduced changes to assessment and enforcement

Human Fertilisation and Embryology Act 2008 - removed the requirement to consider a child's 'need for a father'; extended right to IVF to same-sex couples and redefined the terms 'mother' and 'father'

Scottish Legislation

Treaty of Union 1706
Social Work (Scotland) Act 1968
Domicile and Matrimonial Proceedings Act 1973
Divorce (Scotland) Act 1976
Matrimonial Homes (Family Protection) (Scotland) Act 1981

Family Law Act 1986
Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993
Children (Scotland) Act 1995
Act of Sederunt (Family Proceedings in the Sheriff Court) 1996

International Conventions

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
Hague Convention on the Civil Aspects of International Child Abduction 1980
Hague Convention on Inter-Country Adoption 1993

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children 1996
Schengen Agreement 1985

Rules & Regulations

Children (Allocation of Proceedings) Order 1991
Family Proceedings Rules 1991
Civil Proceedings Rules 1998
Community Legal Service (Costs) Regulations 2000
Community Legal Service (Cost Protection) Regulations 2000
Blood Tests (Evidence of Paternity) (Amendment) Regulations 2001
Education (Pupil Information) (England) Regulations 2005
Families Proceedings Rules 2005
The Family Proceedings (Amendment) (No. 2) Rules 2008
The Family Proceedings (Amendment) (No. 2) Rules 2009
The Family Procedure Rules 2010

Practice Directions

Practice Direction: Child: change of surname [1995] 1 FLR 458
President's Direction (Human Rights Act 1998) [2000] 2 FLR 429
Family Proceedings (Allocation to Judiciary Amendment) Directions 2002
Public Law Protocol [2003] 2 FLR 719
Practice Direction: Family proceedings: court bundles, July 2006
President's Guidance: McKenzie Friends, April 2008
Practice Direction Care Cases: Judicial Continuity and Judicial Case Management

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Resource 2: County Courts

This is a list of County Courts which handle family cases; note that under reforms intended by the Coalition Government, a number of County Courts are scheduled for closure, these are marked in grey.

Aberystwyth County Court
Accrington County Court
Aldershot & Farnham County Court
Altrincham County Court

Barnet Civil & Family Courts Centre
Barnsley County Court
Barrow-in-Furness County Court
Bath County Court
Birkenhead County Court
Birmingham Family Courts
Bishop Auckland County Court
Blackburn County Court
Blackpool County Court
Blackwood Civil & Family Court
Bodmin County Court
Bournemouth County Court
Bradford Combined court Centre
Brecon Law courts
Brentford County Court
Bridgend Law courts
Brighton County Court Family Centre
Bristol County Court
Bromley County Court

Burnley Combined court Centre
Bury County Court
Bury St Edmunds County Court

Caernarfon County Court
Cambridge County Court
Canterbury Combined court Centre
Cardiff Civil Justice Centre
Carlisle Combined court Centre
Carmarthen County Court
Chelmsford County & Family Proceedings court
Chester Civil Justice Centre
Clerkenwell & Shoreditch County Court
Consett County Court
Crewe County Court
Croydon County Court

Dartford County Court
Dewsbury County Court
Durham County Court

Epsom County Court

Gateshead County Court
Gloucestershire Family & Civil courts
Great Grimsby Combined court Centre
Guildford County Court

Harlow County Court
Hartlepool County Court
Haverfordwest County Court
Hitchin County Court

Kendal County Court

Lancaster County Court
Leicester County Court
Leigh County Court
Liverpool Civil & Family Court
Llanelli County Court
Llangefni County Court
London – see Principal Registry
Lowestoft County Court
Luton County Court

Maidstone Combined court Centre
Manchester Civil Justice Centre

Medway County Court
Milton Keynes County Court
Morpeth & Berwick County Court

Neath & Port Talbot County Court
Newcastle-upon-Tyne Combined court Centre
Newport (Gwent) County Court
Newport (Isle of Wight) Crown & County Court
North Shields County Court

Oxford Combined court Centre

Penzance County Court
Plymouth Combined court
Pontefract County Court
Pontypridd County Court
Portsmouth Combined court Centre
Preston Combined court Centre

Principal Registry of the Family Division, London

Rawtenstall County Court
Rhyl County Court
Rotherham County Court

Salford County Court
Salisbury Crown & County Court
Scarborough County Court
Scunthorpe County Court
South Shields County Court
Southampton Combined court Centre
Southend County Court
Southport County Court
St. Helens County Court
Staines County Court
Stoke-on-Trent Combined court
Sunderland County Court
Swansea Civil Justice Centre
Swindon Combined court

Tameside County Court
Trowbridge County Court
Tunbridge Wells County Court

Uxbridge County Court

Wakefield County Court
Welshpool & Newtown County Court
Weymouth & Dorchester Combined court Centre
Whitehaven County Court
Wigan County Court
Winchester Combined court Centre
Wolverhampton Combined court Centre
Worthing County Court
Wrexham County Court

Yeovil County Court
York County Court

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Resource 3: List of Forms

Forms highlighted in purple can be downloaded from the courts Service website – just click on the number. For other forms you must contact the Court or other body (e.g. CSA) directly.

Form	Name
A4	Application For Revocation Of An Order Freeing A Child For Adoption
A5	Application For Substitution Of One Adoption Agency For Another
A50	Application for a placement order Section 22 Adoption and Children Act 2002
A51	Application for variation of a placement order Section 23 Adoption and Children Act 2002
A52	Application for revocation of a placement order Section 24 Adoption and Children Act 2002
A53	Application for a Contact Order Section 26 Adoption and Children Act 2002
A54	Application for variation or revocation of a Contact Order Section 27(1)(b) Adoption and Children Act 2002
A55	Application for permission to change a child's surname Section 28 Adoption and Children Act 2002
A56	Application for permission to remove a child from the United Kingdom Section 28 Adoption and Children Act 2002
A57	Application for a recovery order Section 41 Adoption and Children Act 2002
A58	Application for an adoption order Section 46 Adoption and Children Act 2002
A59	Application for a Convention adoption order Section 46 Adoption and Children Act 2002
A60	Application for an adoption order (excluding a Convention adoption order) where the child is habitually resident outside the British Islands and is brought into the United Kingdom for the purposes of adoption Section 46 Adoption and Children Act 2002
A61	Application for an order for Parental Responsibility prior to adoption abroad Section 84 Adoption and Children Act 2002
A62	Application for a direction under section 88(1) of the

	Adoption and Children Act 2002
A63	Application for an order to annul a Convention adoption or Convention adoption order or for an overseas adoption or determination under section 91 to cease to be valid Section 89 Adoption and Children Act 2002
A50 Notes	Application for a placement order Section 22 Adoption and Children Act 2002 – Notes on completing the form
A51 Notes	Application for variation of a placement order Section 23 Adoption and Children Act 2002 – Notes on completing the form
A52 Notes	Application for revocation of a placement order Section 24 Adoption and Children Act 2002 – Notes on completing the form
A53 Notes	Application for a Contact Order Section 26 Adoption and Children Act 2002 – Notes on completing the form
A54 Notes	Application for variation or revocation of a Contact Order Section 27(1)(b) Adoption and Children Act 2002 – Notes on completing the form
A55 Notes	Application for permission to change a child's surname Section 28 Adoption and Children Act 2002 – Notes on completing the form
A56 Notes	Application for permission to remove a child from the United Kingdom Section 28 Adoption and Children Act

	2002 – Notes on completing the form
A57 Notes	Application for a recovery order Section 41 Adoption and Children Act 2002 – Notes on completing the form
A58 Notes	Application for an adoption order Section 46 Adoption and Children Act 2002 – Notes on completing the form
A59 Notes	Application for a Convention adoption order Section 46 Adoption and Children Act 2002 – Notes on completing the form
A60 Notes	Application for an adoption order (excluding a Convention adoption order) where the child is habitually resident outside the British Islands and is brought into the United Kingdom for the purposes of adoption Section 46 Adoption and Children Act 2002 – Notes on completing the form
A61 Notes	Application for an order for Parental Responsibility prior to adoption abroad Section 84 Adoption and Children Act 2002 – Notes on completing the form
A62 Notes	Application for a direction under section 88(1) of the Adoption and Children Act 2002 – Notes on completing the form
A63 Notes	Application for an order to annul a Convention adoption or Convention adoption order or for an overseas adoption or determination under section 91 to cease to

	be valid Section 89 Adoption and Children Act 2002 – Notes on completing the form
A64	Application to receive information from court records Section 60(4) Adoption and Children Act 2002
A64A	Application to receive information from court records about a parental order Section 60(4) Adoption and Children Act 2002
A65	Confidential information
A100	Consent to the placement of my child for adoption with any prospective adopters chosen by the Adoption Agency Section 19 of the Adoption and Children Act 2002
A101	Consent to the placement of my child for adoption with identified prospective adopters Section 19 of the Adoption and Children Act 2002
A101A	Agreement to the making of a parental order in respect of my child Section 54 of the Human Fertilisation and Embryology Act 2008
A102	Consent to the placement of my child for adoption with identified prospective adopter(s) and, if the placement breaks down, with any prospective adopter(s) chosen by the adoption agency Section 19 of the Adoption and Children Act 2002
A103	Advance Consent to Adoption Section 20 of the Adoption and Children Act 2002
A104	Consent to Adoption The Adoption and Children Act 2002
A105	Consent to the making of an Order under Section 84 of the Adoption and Children Act 2002
A106	Withdrawal of Consent Sections 19 and 20 of the Adoption and Children Act 2002
A107	Consent by the child's parent to adoption by their partner The Adoption and Children Act 2002
C1	Application for an Order
C1A	Allegations of harm and domestic violence (Supplemental information form)
C2	Application • For permission to start proceedings • For an order or directions in existing proceedings • To be joined as, or cease to be, a party in existing family proceedings under the Children Act 1989
C3	Application for an order authorising search for, taking charge of and delivery of child

C4	Application for an order for disclosure of a child's whereabouts
C5	Local Authority application concerning the registration of a child-minder or a provider of day care
C8	Confidential contact details
C9	Statement of service
C11	Supplement for an application for an Emergency Protection Order
C12	Supplement for an application for a warrant to assist a person authorised by an Emergency Protection Order
C13	Supplement for an application for a Care or Supervision Order
C13A	Supplement for an application for a Special Guardianship Order Section 14A Children Act 1989
C14	Supplement for an application for authority to refuse contact with a child in care
C15	Supplement for an application for contact with a child in care
C16	Supplement for an application for a Child Assessment Order
C17	Supplement for an application for Education Supervision Order

C17A	Supplement for an application for an extension of an Education Supervision Order
C18	Supplement for an application for a Recovery Order
C19	Application for a warrant of assistance
C20	Supplement for an application for an order to hold a child in Secure Accommodation
C51	Application for a Parental Order Section 54 Human Fertilisation and Embryology Act 2008
C52	Acknowledgement of an application for a Parental Order
C60	Certificate referred to in Article 39 of Council Regulation (EC) No. 2201/ 2003 of 27 November 2003 concerning judgements on Parental Responsibility
C61	Certificate referred to in Article 41(1) of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning judgements on rights of access
C62	Certificate referred to in Article 42(1) of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning the return of the child
C63	Application for declaration of parentage under section 55A of the Family Law Act 1986
C64	Application for declaration of legitimacy or

	legitimation under section 56 (1) (b) and (2) of the Family Law Act 1986
C65	Application for declaration as to adoption effected overseas under section 57 of the Family Law Act 1986
C66	Application for inherent jurisdiction order in relation to children
C67	Application under the Child Abduction and Custody Act 1985 or Article 11 of Council Regulation (EC) 2201/2003
C68	Application for international transfer of jurisdiction to or from England and Wales
C69	Application for registration, recognition or non recognition of a judgement under Council Regulation (EC) 2201/2003
C78	Application for attachment of a warning notice to a Contact Order
C79	Application related to enforcement of a Contact Order
C100	Application under the Children Act 1989 for a residence, contact, prohibited steps, specific issue section 8 order or to vary or discharge a section 8 order
C110	Application under the Children Act 1989 for a care or supervision order

C(PRA1)	Parental Responsibility Agreement
C(PRA2)	Step Parent Parental Responsibility Agreement
C(PRA3)	Parental Responsibility Agreement Section 4ZA Children Act 1989 (Acquisition of Parental Responsibility by second female parent)
D5	Notice to be indorsed on documents served in accordance with rule 6.14
D6	Statement of Reconciliation
D8	Divorce/dissolution/(judicial) separation petition
D8 Notes	Supporting notes for guidance on completing a divorce/dissolution/(judicial) separation petition
D8A	Statement of arrangements for children
D8B	Answer to a divorce/dissolution/(judicial) separation or nullity petition
D8D	Petition for a presumption of death decree/order and the dissolution of a marriage/civil partnership
D8D Notes	Supporting notes for guidance on completing a petition for a presumption of death decree/order and the dissolution of a marriage/civil partnership
D8N	Nullity petition
D8N Notes	Supporting notes for guidance on completing a nullity petition

D11	Application Notice
D13B	Affidavit in support of a request to dispense with service of the divorce/dissolution/nullity (judicial) separation petition on the Respondent
D20	Medical Examination: statement of parties & inspector
D36	Notice of Application for Decree Nisi to be made Absolute or Conditional Order to be made final
D50	Notice of application on ground of failure to provide maintenance or for alteration of maintenance agreement during parties' lifetime
D50A	Notice of proceedings and acknowledgement of service - maintenance/property proceedings
D50B	Application under Section 17 of the Married Women's Property Act 1882/Section 67 of the Civil Partnership Act 2004/Application to transfer a tenancy under the Family Law Act 1996 Part IV
D50C	Application on ground of failure to provide maintenance
D50D	Application for alteration of maintenance agreement after the death of one of the parties
D50E	Application for permission to apply for financial relief after overseas divorce/dissolution etc under section 13 of the Matrimonial and Family Proceedings Act 1984 / paragraph 4 of Schedule 7 to the Civil Partnership Act 2004
D50F	Application for financial relief after overseas divorce etc under section 12 of the Matrimonial and Family Proceedings Act 1984/paragraph 4 to Schedule 7 to the Civil Partnership Act 2004
D50G	Application to prevent transactions intended to defeat prospective applications for financial relief
D50H	Application for alteration of maintenance agreement during parties lifetime
D50J	D50J Application for an order preventing avoidance under section 32L of the Child Support Act 1991
D50K	Notice of Application for Enforcement by such method of enforcement as the Court may consider appropriate
D62	Request for issue of Judgement Summons
D70	Application for Declaration of Marital/Civil Partnership Status
D80A	Affidavit in Support of divorce/(judicial) separation - adultery
D80B	Affidavit in Support of divorce/dissolution (judicial) separation - unreasonable behaviour
D80C	Affidavit in Support of divorce/dissolution/(judicial) separation - desertion

D80D	Affidavit in Support of divorce/dissolution/(judicial) separation – 2 years consent
D80E	Affidavit in Support of divorce/dissolution/(judicial) separation – 5 years separation
D80F	Affidavit in Support of annulment – void marriage/civil partnership
D80G	Affidavit in support of annulment – voidable marriage/civil partnership
D81	Statement of information for a Consent Order in relation to a financial remedy
D84	Application for a decree nisi/conditional order or (judicial) separation decree/order
D89	Request for personal service by a court bailiff
D151	Application for registration of maintenance order in a magistrates' court
D180	Concerning judgements in matrimonial matters
D252	Notice of commencement of assessment of bill of costs
D254	Request for a default costs certificate
D258	Request for a detailed assessment of hearing
D258A	Request for detailed assessment (legal aid only)
D258B	Request for detailed assessment (Costs payable out of a fund other than the Community Legal Service Fund)
D258C	Request for detailed assessment hearing pursuant to an order under Part III of the Solicitors Act 1974
D259	Notice of appeal against a detailed assessment (divorce)
FL401	Application for a Non-Molestation Order/an Occupation Order
FL401A	Application for a Forced Marriage Protection Order
FL403	Application to vary, extend or discharge
FL403A	Application to vary, extend or discharge Forced Marriage Protection Orders
FL407	Applications for warrant of Arrest
FL407A	Application for warrant of arrest for a Forced Marriage Protection Order
FL415	Statement of service
FL430	Application for leave to apply for a Forced Marriage Protection Order
FL431	Application to join / cease as a party to Forced Marriage Protection Proceedings
FM1	Family Mediation Information and Assessment Form
Form A	Notice of [intention to proceed with] an application for a financial order **(NOTE: This form should be used**

	whether the applicant is proceeding with an application in the petition or making a free standing application)
Form A1	Notice of [intention to proceed with] an application for a financial remedy (other than a financial order) in the county or high court
Form A2	Notice of [intention to proceed with] an application for a financial remedy in the magistrates court
Form B	Notice of an application to consider the financial position of the Respondent after the divorce/dissolution
Form E	Financial Statement for a financial order or for financial relief after an over seas divorce or dissolution etc
Form E Notes	Form E (Financial Statement for a financial order or for financial relief after an overseas divorce or dissolution etc) Notes for guidance
Form E1	Financial Statement for a financial remedy (other than a financial order or financial relief after an overseas divorce/dissolution etc) in the county or high court
Form E2	Financial Statement for a financial remedy in the magistrates court
Form F	Notice of allegation in proceedings for financial remedy
Form H	Estimate of costs (financial remedy)
Form H1	Statement of Costs (financial remedy)
Form I	Notice of request for periodical payments order at the same rate as order for interim maintenance pending outcome of proceeding
Form P	Pension inquiry form
Form P1	Pension sharing annex
Form P2	Pension attachment annex
Form PPF	Pension Protection Fund Inquiry Form
Form PPF 1	Pension Protection Fund sharing annex
Form PPF 2	Pension Protection Fund attachment annex
FP1	Application under Part 19 of the Family Procedure Rules 2010
FP1A	Application under Part 19 of the Family Procedure Rules 2010 Notes for applicant on completing the application (Form FP1)
FP1B	Application under Part 19 of the Family Procedure Rules 2010 Notes for respondent
FP2	Application notice Part 18 of the Family Procedure Rules 2010
FP3	Application for injunction (General form)

FP5	Acknowledgment of service Application under Part 19 of the Family Procedure Rules 2010
FP6	Certificate of service
FP8	Notice of change of solicitor
FP9	Certificate of suitability of litigation friend
FP25	Witness Summons
N56	Form for replying to an attachment of earnings application (statement of means)
N161	Appellant's Notice
N161A	Guidance Notes on Completing the Appellant's Notice
N161B	Important Notes for Respondents
N162	Respondent's Notice
N162A	Guidance Notes for Completing the Respondent's Notice
N163	Skeleton Argument
N164	Appellant's Notice
N260	Statement of costs (summary assessment)
N285	General Affidavit
N323	Request for Warrant of Execution
N336	Request and result of search in the attachment of earnings index
N337	Request for attachment of earnings order
N349	Application for a third party debt order
N379	Application for a charging order on land or property
N380	Application for charging order on securities
PLO1	Application for a care order or supervision order: Supplementary form
PLO2	The local authority's case summary
PLO3	Draft case management order
PLO4	Allocation record and timetable for the child(ren)
PLO5	Directions and allocation on issue of proceedings
PLO6	Directions and allocation at first appointment
PLO8	Standard Directions on Issue
PLO9	Standard Directions at First Appointment
PLP10	Order Menu – Directions Revised Private Law Programme
REMO 1	Notice of Registration
REMO 2	Notice of Refusal of Registration.

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Resource 4: Support Organisations

The list that follows is simply an alphabetical listing of organisations which may be able to help you or provide information. Depressingly, every time I edit this list it gets shorter. Inclusion on this list does not mean that we endorse the organisation or agree with its policies or methods. Be very cautious when approaching any group; some may be misogynist, or encourage other unacceptable beliefs. Distrust particularly those which are Government-funded. All Government-run and Government-approved charities and agencies follow the line that father absence is the fault of fathers, and they promote therefore a concept of 'responsible fatherhood' which is doomed to failure because it is based on a falsehood. State sponsorship serves one purpose only, to choke off funding and membership to genuine equal parenting campaigns and to prevent organisations becoming a threat to the anti-family agenda.

We suggest you join web-based forums such as Facebook anonymously; otherwise your postings may well be used against you.

Angry Harry – We're very fond of this wonderful website which is dedicated to exposing feminism within government and society.

Anti Misandry – website and fairly active forum promoting awareness of misandry.

BFMS – *British False Memory Society*, provides support for victims of false allegations made as a result of the recovery of false memories of childhood sexual abuse.

Blundering News – also known as *Blunderingsocialworkers*; site dedicated to exposing the incompetence and corruption of social services, solicitors, judges, councils, fools, and everybody who abuses an official position.

The Centre for Separated Families – a national charity which supports both mothers and fathers to access support from public services; also provides training and consultancy and organises conferences based very much around a family-centred philosophy.

The Cheltenham Group – defunct but the website remains; a gentlemanly organisation dedicated to combating government policies that destroy the traditional family structure through marginalisation of the male role.

Children Need Families - supports parents, grandparents and the extended family in maintaining and promoting a child's relationship with his or her immediate and extended family, during and after separation or divorce.

The Custody Minefield – one of the few organisations actually campaigning rather than just giving out advice. Loads of information and featuring a significant report into relocation.

Divorce Aid – organisation providing advice, counselling, and legal advice. They will advise you to use a solicitor, however, and promote collaborative law.

Equal Parenting Alliance – a single issue political party promoting most of the policies espoused by F4J and set up by former members. It also offers a support service through **Family Courts**.

Even Toddlers Need Fathers – tremendous YouTube resource providing huge amount of information on the necessity of a father in a child's life, and refuting the arguments against.

Falsely Accused – formerly known as *Action Against False Allegations*, provides support for victims of false allegations of any serious arrestable offence.

Family Law Society – offers free legal and emotional support to parents going through Family Court cases and to victims of domestic abuse; lobbies for a presumption of shared parenting.

Family Matters Institute – charity and registered company carrying out research and training from a specifically Christian perspective; lobbies for a presumption of shared parenting.

Family Rights Group – works with families subject to social services investigations to help children remain with their families.

FASO – *False Allegations Support Organisation*, offers clear information, practical advice, and emotional support for victims of false accusations. They also run a telephone helpline.

FASSIT – *Family and Social Services Information Team*, support and information resource for families fighting the social services, for example over forced adoption.

Fatherhood Institute – formerly *Fathers Direct*, government funded 'charity' which aims to shape public policy to take fatherhood into account. Politically correct and nothing too controversial!

Fathers 4 Justice – the most notorious of them all.

FNF – perhaps the best known of the fathers' groups after *Fathers 4 Justice* and probably the oldest, established in 1974. *Families Need Fathers* (FNF) no longer campaigns for changes to the family justice system and derives much of its funding from Government, so it has to keep its nose clean. Members who query its policy of government appeasement are expelled. Approach with caution.

Forced Adoption – helps parents who are trying to recover or make contact with children who have been snatched by social services to feed the adoption industry.

Glenn Sacks – US commentator on fathers' rights and director of **Fathers & Families**. Sign up to his blog which covers events worldwide.

Grandparents Apart – formerly the *Grandparents' Federation*, support for grandparents separated from their grandchildren.

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Grandparents' Association – provides support for grandparents whose grandchildren have been taken into care, or who are being denied contact.

Grandparents Plus – national charity supporting role of grandparents and wider family in childcare, particularly where parents are no longer able to care for their children themselves.

JUMP –*Jewish Unity for Multiple Parenting*, provides support and advice for Jewish parents after divorce.

Inside Divorce – provides resources and information, and help on finding solicitors.

Legal Survival – provides support and advice for victims of injustice by the child support system, including the police, social services, Family Courts, the NSPCC, prisons, etc.

Mankind – charity which provides support for the male victims of abuse and domestic violence; also supports other campaigns for the equitable treatment of men and boys.

MATCH – *Mothers Apart from their Children*, established in 1979, is possibly the best option for mothers with contact problems after Wikivorce; they provide support for mothers who are apart from their children because of ill-health, fostering, adoption, abduction abroad, alienation following high-conflict family breakdown or family rows.

Men's Advice Line – Home Office-run support service for male victims of domestic violence. Bear in mind that the Home Office's take on DV is the standard sexist one.

Men's Aid – defunct but website is still functioning; charity established to support men who have been abused in any way, for example as victims of domestic violence or false allegations.

Men's Health Network – gives information and education into men's health issues.

NACSA – *National Campaign for Child Support Action*, undoubtedly the best resource for help with child support, whether you are paying child support or in receipt of it.

PAIN – *Parents Against Injustice*, helping parents caught up in the care system.

Parents and Abducted Children Together – glamorous international charity formed to fight and raise awareness of international child abduction

Parents4Protest – informative Welsh campaign and news site.

Relate – charity giving advice on divorcing sensibly and amicably.

Reunite – charity specialising in international parental child abduction. Your first port of call in all international cases.

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SPIG – *Shared Parenting Information Group*, massive resource of information in support of shared parenting; not terribly accessible.

Stephen Baskerville – tireless American academic writing about the 'divorce industrial complex', corruption in the US family courts and the 'war on fathers'. Author of the indispensable *Taken into Custody*. Sign up for his newsletter!

Wikivorce – a relatively new website with a growing range of resources and an active forum populated by experienced parents and lawyers as well as litigants new to the Family Courts. A good place to try out ideas and gauge the reaction of your peers before using them in court.

It also publishes a regular 'Wkizine' containing a variety of articles. Probably weighted towards the financial side of divorce and towards mothers, but that is only a reflection on its membership.

Women's Aid – *Women's Aid* is an extreme gender-feminist organisation lobbying for a presumption of no contact between fathers and their children following family breakdown unless the father can prove that it is 'safe'.

Resource 5: Sources of Information

Throughout this e-Book we have tried to confine references to those which can be followed on the internet, and below we list some more web-based resources which can help you. Which also list those libraries which contain collections you may find useful, if not essential.

There was a time when the Royal courts of Justice ran a Bar Library open to litigants in person, but it was closed to provide space for more courts.

Web resources

Legislation.gov.uk – provides access to all current UK legislation.

Justice.gov.uk – website of the Ministry of Justice; gives you access to all necessary forms and court information.

The British and Irish Legal Information Institute – (Bailii), invaluable site with access to legislation and all published cases.

Family Law Week – an excellent online magazine providing news, new cases, new legislation and analysis

The International Child Abduction Database – (INCADAT), does what it says on the tin.

DocDel – publisher of Sweet & Maxwell's document delivery service: allows you to order copies of articles, legislation and law reports for a fee.

British Library Document Supply – a similar service for which there is also a charge.

The British Library also hosts an **Electronic Resources Guide for Law**.

Citizens Advice Bureau – the first port of call for many, but very poor on family law advice.

Libraries

Your local public library is a useful and underused resource, especially if it has an associated reference library; it is also worth spending a day researching in London at one or more of these libraries:

British Library: Social Sciences Reading Room: reference library holding legislation, law reports, judgements, etc. You will need proof of ID.
Address: 96 Euston Road, London, NW1 2DB
Nearest London Underground: Euston / King's Cross St. Pancras
Tel: 0207 412 7676 (Reading Room)0207 412 7677 (Admissions)
Hours: Mon 10am-8pmTue, Wed, Thur 9.30am - 8pmFri, Sat 9.30am - 5pm

Guildhall Library: reference library with collections of law reports, legislation, etc.
Address: Corporation of London, Aldermanbury off Gresham Street, London, EC2P 2EJ
Nearest London Underground: BankTel: 0207 332 1868
Hours: Mon-Sat 9.30am-5pm

Hammersmith Reference Library
Address: London Borough of Hammersmith & Fulham, Shepherds Bush Road, W6 7AT.
Nearest London Underground: Hammersmith
Tel: 0208 753 3817Web: Hours: Mon, Tue, Thur 9.30am-8pmWed, Fri, Sat 9.30am-5.30pmSun 1.15pm-5pm

Holborn Library: check their catalogue online.
Address: London Borough of Camden, 32-38 Theobalds Road, London, WC1X 8PA
Nearest London Underground: Chancery Lane/ Holborn
Tel: 0207 974 6345
Hours: Mon, Thur 10am-7pmTue, wed, Fri 10am-6pmSat 10am-5pm

Westminster Reference Library
Address: City of Westminster, Ground Floor, 35 St. Martin's Street, London, WC1 7HP
Nearest London Underground: Leicester Square/ Piccadilly Circus/ Charing Cross
Tel: 0207 641 4634
Hours: Mon-Fri 10am-8pm; Sat 10am-5pm

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